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Doing Aweigh with Uncertainty: Navigating Jones Act Seamen'sClaims Against Third Parties

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Doing Aweigh with Uncertainty: Navigating Jones Act Seamen's Claims Against Third Parties

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INTRODUCTION: A TALE OF A FATEFUL TRIP

Six people embarked on a three-hour tour of Louisiana's territorial waters in the M.V. Minnow, including a first mate named Gilligan, a millionaire couple, a movie star, a farm girl, and a science professor.[1] The vessel's steering system malfunctioned in a storm, causing the vessel to wreck onto a deserted island. After months on the island, the Coast Guard finally rescued the shipwrecked castaways. Upon being informed of their legal rights, the six castaways brought negligence claims against the manufacturer of the M.V. Minnow's steering system.[2]

At trial, the parties proved that the manufacturer knew of a defect that could cause the steering to fail suddenly and lead to catastrophic consequences. Despite this knowledge, the manufacturer neither fixed the steering system nor warned vessel operators of this potential hazard. After making these factual findings and applying general maritime products liability law, the jury concluded that the manufacturer acted willfully and

1. Facts and characters of this introductory hypothetical are loosely based on *Gilligan's Island*. *See Gilligan's Island* (CBS television broadcast Sept. 1964). This Comment leaves out the Skipper because his ownership of the vessel could complicate the issue presented. As a vessel owner, the Skipper could be liable to Gilligan for breaching the duty of unseaworthiness. Mitchell v. Trawler Racer, Inc., 362 U.S. 539, 549 (1960). Moreover, Skipper owes a duty of reasonable care under the circumstances to the other passengers. Kermerac v. Compagnie Generale Transatlantique, 358 U.S. 625, 632 (1959).

2. Facts and causes of action are loosely based on a Louisiana Third Circuit Court of Appeal case. *See* Warren v. Shelter Mut. Ins. Co., 196 So. 3d 776 (La. Ct. App. 2016).

wantonly in failing to warn vessel operators of the danger. Accordingly, the court awarded the castaways compensatory and punitive damages against the manufacturer. Not all of the castaways recovered the punitive damages awarded, however.

Under the reasoning of the United States Fifth Circuit Court of Appeals in *Scarborough v. Clemco Industries*, Gilligan would not be able to recover punitive damages from the third-party manufacturer because he was a member of the crew of the M.V. Minnow.[3] However, the non-seafarers—the millionaire couple, the movie star, the farm girl, and the science professor—all may be able to recover maritime law punitive damages from the third-party tortfeasor. Gilligan's employment connection to the M.V. Minnow precludes his recovery of punitive damages from the manufacturer despite the fact that he suffered from the same injuries caused by the same tortious misconduct.

Absent a controlling congressional statute, maritime law should not treat seamen any differently in their remedies against a third-party non-employer. This anomaly restricts the remedies of seamen and shields the third-party tortfeasor from accountability to all victims of its wrongful conduct. Relying on United States Supreme Court cases adjudicated subsequent to *Scarborough*,[4] courts within the Fifth Circuit Court of Appeals remain divided on whether seamen may recover punitive damages against third-party tortfeasors.[5] In the United States District Court for the Eastern District of Louisiana, several judges have held, relying on *Scarborough*, that seamen cannot recover punitive damages from a third party.[6] One judge within the same district has disagreed, however, relying on the United States Supreme Court's decision in *Atlantic Sounding Co., Inc. v. Townsend*.[7] After revisiting *Scarborough* in light of the Court's

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3. Scarborough v. Clemco Indus., 391 F.3d 660, 667–68 (5th Cir. 2004), *cert. denied*, 544 U.S. 999 (2005).

4. *See* Atl. Sounding Co. v. Townsend, 557 U.S. 404 (2009); Exxon Shipping Co. v. Baker, 554 U.S. 471 (2008); *see also Scarborough*, 391 F.3d 660.

5. *See* Collins v. A.B.C. Marine Towing, L.L.C., No. 14-1900, 2015 WL 5254710 (E.D. La. Sept. 9, 2015) (Fallon, J.); Hume v. Consol. Grain & Barge, Inc., No. 15-0935, 2016 WL 1089349 (E.D. La. Mar. 21, 2016) (Zainey, J.). *But see* Howard v. Offshore Liftboats, L.L.C., No. 13-4811, 2015 WL 7428581 (E.D. La. Nov. 20, 2015) (Morgan, J.); Wade v. Clemco Indus. Corp., No. 16-502, 2017 WL 434425 (E.D. La. Feb. 1, 2017) (Fallon, J.).

6. *See Howard*, 2015 WL 7428581; *see also Scarborough*, 391 F.3d 660.

7. *See Collins*, 2015 WL 5254710, at *3–4; *Hume*, 2016 WL 1089349, at *2 (Fallon, J.) (arguing that the subsequent Supreme Court decision "effectively overruled" the Fifth Circuit precedent); *see also Townsend*, 557 U.S. 404. *But see Wade*, 2017 WL 434425 (demonstrating Judge Fallon changing course and

reasoning in *Townsend*, the *en banc* Fifth Circuit should reverse *Scarborough* and permit both seamen and non-seamen to recover punitive damages under general maritime law.

Part I of this Comment gives a brief overview of admiralty jurisdiction as well as the scope of maritime law. This Part also explains the sources of maritime law, its general principle of uniformity, and the remedies available to seamen. Part II analyzes the chronology of cases addressing maritime punitive damages. Additionally, Part II illustrates the split in the Eastern District of Louisiana concerning whether a Jones Act seaman may recover punitive damages from a third-party non-employer. Part III of this Comment argues that punitive damages remain available under general maritime law and that these damages are available to a Jones Act seaman against a third-party non-employer. To best achieve uniformity in maritime law, this Comment proposes that the law should afford seamen and non-seafarers the same protections under general maritime law against non-employers; to do otherwise would drown all hopes of protecting seamen as the "wards of admiralty."[8]

I. A THREE-HOUR TOUR THROUGH ADMIRALTY LAW

Over the past several centuries, maritime law has developed into an expansive body of rules and principles covering a vast sea of parties and occurrences. Preliminarily, courts must determine whether the cause of action invokes admiralty jurisdiction. Once established, the court then must consider which of the various theories of liability the plaintiff may pursue. Finally, if the court finds the defendant liable, it must decide what types of damages the plaintiff may recover.

A. The Scope of Admiralty Jurisdiction

Pursuant to Article III, Section 2 of the United States Constitution, "The judicial power shall extend . . . to all [c]ases of admiralty and

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finding that Jones Act seamen cannot recover punitive damages and *Scarborough* remains good law).

8. *See* Ramsay v. Allegre, 25 U.S. 611, 620 (1827) (Johnson, J., concurring) (referring to seamen for the first time as the "wards of . . . Admiralty"). Many later cases followed *Ramsay*'s use of this terminology. *See* Robertson v. Baldwin, 165 U.S. 275, 286 (1897); Wilder v. Inter-Island Steam Nav. Co., 211 U.S. 239, 247 (1908); *see also* Warner v. Goltra, 293 U.S. 155, 162 (1934) ("In respect of dealings of that order, the maritime law by inveterate tradition has made the ordinary seaman a member of a favored class. He is a 'ward of the admiralty,' often ignorant and helpless, and so in need of protection against himself as well as others.").

maritime [j]urisdiction."[9] Moreover, the Constitution also grants Congress the power "[t]o make all [l]aws which shall be necessary and proper for carrying into [e]xecution the foregoing [p]owers and all other [p]owers vested by this Constitution in the [g]overnment of the United States or in any [d]epartment or [o]fficer thereof."[10] Although Congress possesses the "paramount power" to determine maritime law,[11] if no controlling congressional statute applies, general maritime law as developed by federal courts governs admiralty.[12] Relying on state and federal sources, general maritime law mixes traditional common law rules, modifies those rules, and creates new maritime principles.[13] Therefore, general maritime law, also known as federal maritime law, as developed by the judiciary, coexists with and complements the statutory maritime law set and fixed by Congress.

American maritime law draws its principles from three sources: federal statutes; federal common law; and, occasionally, state law.[14] Courts consistently emphasize that "the Constitution must have referred to a system of law coextensive with, and operating uniformly in, the whole country"[15] when it granted original jurisdiction to all cases of admiralty

9. U.S. CONST. art. III, § 2, cl. 1. Congress subsequently reinforced federal maritime jurisdiction in 28 U.S.C. § 1333 (2012), which states, "The district courts shall have original jurisdiction, exclusive of the courts of the States, of . . . [a]ny civil case of admiralty or maritime jurisdiction, saving to suitors in all cases all other remedies to which they are otherwise entitled."

10. U.S. CONST. art. I, § 8, cl. 18.

11. S. Pac. Co. v. Jensen, 244 U.S. 205, 215 (1917) ("[I]t must now be accepted as settled doctrine that, in consequence of these provisions, Congress has paramount power to fix and determine the maritime law which shall prevail throughout the country.").

12. *Id.* ("[I]n the absence of some controlling statute, the general maritime law, as accepted by the [f]ederal courts, constitutes part of our national law, applicable to matters within the admiralty and maritime jurisdiction.").

13. *See* E. River S.S. Corp. v. Transamerica Delaval, Inc., 476 U.S. 858, 864–65 (1986) ("[T]he general maritime law is an amalgam of traditional common-law rules, modifications of those rules, and newly created rules.").

14. *See Jensen*, 244 U.S. at 216. State law only applies in certain situations. As stated by the Supreme Court, "no such legislation is valid if it contravenes the essential purpose expressed by an act of Congress, or works material prejudice to the characteristic features of the general maritime law, or interferes with the proper harmony and uniformity of that law in its international and interstate relations." *Id.*; *see also* Yamaha Motor Corp. v. Calhoun, 516 U.S. 199 (1996).

15. The Lottawanna, 88 U.S. 558, 575 (1874).

and maritime law to federal courts.[16] This uniformity principle guides courts and Congress to develop a consistent body of rules throughout the entire United States[17] for causes of action invoking admiralty jurisdiction.[18] Uniformity provides practical consistency and predictability for actors engaged in maritime commerce throughout the United States. If the plaintiff's case falls within the purview of maritime jurisdiction, he may pursue various causes of action.

B. The Sea of Remedies Available to Jones Act Seamen

The Merchant Marine Act of 1920, commonly known as the Jones Act, does not define "seaman" in its statutory language,[19] but the Supreme Court has created a two-part test for such a determination.[20] The seaman must "contribute to the function of the vessel or to the accomplishment of its mission,"[21] and the seaman must have a substantial connection both in

16. *See* Chelentis v. Luckenbach S.S. Co., 247 U.S. 372 (1918); Union Fish Co. v. Erickson, 248 U.S. 308 (1919); Moragne v. States Marine Lines, Inc., 398 U.S. 375 (1970).

17. *See The Lottawanna*, 88 U.S. at 575.

18. Admiralty jurisdiction arises through congressional grants of jurisdiction. *See, e.g.*, Jones Act, 46 U.S.C. § 30104 (2012); Death on the High Seas Act, 46 U.S.C. §§ 30301–30308; Admiralty Extension Act, 46 U.S.C. § 30101; Longshore and Harbor Workers' Compensation Act, 33 U.S.C. §§ 901–950. Admiralty jurisdiction also arises under general maritime law. *See* Exec. Jet Aviation, Inc. v. City of Cleveland, 409 U.S. 249 (1972). Jurisdiction over a tort requires "locality" and a determination of whether the tort possesses a substantial relationship to traditional maritime activity and the potential to disrupt maritime commerce. *See* The Plymouth, 70 U.S. 20, 34–35 (1865) (explaining admiralty jurisdiction and locality by stating that "[t]his class of cases may well be referred to as illustrating the true meaning of the rule of locality in cases of marine torts, namely, that the wrong and injury complained of must have been committed wholly upon the high seas or navigable waters."); *see also* Sisson v. Ruby, 497 U.S. 358, 362 (1990) (citing Foremost Ins. Co. v. Richardson, 457 U.S. 668, 674–75 (1982)) (establishing the two-part test of admiralty jurisdiction).

19. *See* § 30104; *see also* Lewis v. Lewis & Clark Marine, Inc., 531 U.S. 438, 441 (2001) ("A Jones Act claim is an *in personam* action for a seaman who suffers injury in the course of employment due to negligence of his employer, the vessel owner, or crew members.").

20. *See* Chandris, Inc. v. Latsis, 515 U.S. 347, 368 (1995).

21. McDermott Int'l, Inc. v. Wilander, 498 U.S. 337, 355 (1991) ("The key to seaman status is employment-related connection to a vessel in navigation . . . [W]e believe the requirement that an employee's duties must 'contribute to the function of the vessel or to the accomplishment of its mission' captures well an important requirement of seaman status. It is not necessary that a seaman aid in navigation or

time and nature to the vessel in navigation.[22] Jones Act seamen may recover damages from their employer under multiple theories of liabilities: maintenance and cure; unseaworthiness; and negligence under the Jones Act, among others. General maritime law also provides a vast sea of remedies for Jones Act seamen to pursue against third parties.[23] The identity of the defendant determines the causes of action a seaman may pursue.[24]

1. The Seaman's General Maritime Claim Against the Employer or the Vessel Owner

Before the enactment of the Jones Act, seamen could recover damages against their employer based on two causes of action.[25] Seamen could bring a claim for maintenance and cure against their employer or a claim for damages resulting from the unseaworthiness of the vessel against the vessel owner.[26] Both claims would arise under general maritime law.[27]

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contribute to the transportation of the vessel, but a seaman must be doing the ship's work." (quoting Offshore Co. v. Robison, 266 F.2d 769, 779 (5th Cir. 1959))).

22. *Latsis*, 515 U.S. at 368. *See* Harbor Tug & Barge Co. v. Papai, 520 U.S. 548, 557 (1997) (discussing that determination of an identifiable group of vessels turns on whether the vessels are under common ownership or control).

23. *Latsis*, 515 U.S. at 354.

24. *See infra* Part I.B.

25. The Osceola, 189 U.S. 158, 175 (1903). The Court in this case stated,

> Upon a full review, however, of English and American authorities upon these questions, we think the law may be considered as settled upon the following propositions: 1. That the vessel and her owners are liable, in case a seaman falls sick, or is wounded, in the service of the ship, to the extent of his maintenance and cure, and to his wages, at least so long as the voyage is continued. 2. That the vessel and her owner are, both by English and American law, liable to an indemnity for injuries received by seamen in consequence of the unseaworthiness of the ship, or a failure to supply and keep in order the proper appliances appurtenant to the ship. 3. That all the members of the crew, except, perhaps, the master, are, as between themselves, fellow servants, *and hence seamen cannot recover for injuries sustained through the negligence of another member of the crew* beyond the expense of his maintenance and cure. 4. That the seaman is *not allowed to recover an indemnity for the negligence of the master*, or any member of the crew, but is entitled to maintenance and cure, whether the injuries were received by negligence or accident.

Id. (emphasis added).

26. *Id.*

27. *Id.*

a. Maintenance and Cure

Dating back to the 13th century, courts have recognized that "the vessel and her owners are liable, in case a seaman falls sick, or is wounded, in the service of the ship, to the extent of his maintenance and cure, and to his wages, at least so long as the voyage is continued."[28] The seaman's claim for maintenance and cure exists independently of his claims for negligence or unseaworthiness.[29] Once the seaman has been injured, the obligation to pay maintenance and cure benefits arises immediately and does not require a finding of negligence or fault.[30] Maritime law has long recognized that the vessel owner or employer owes a duty of "maintenance and cure," and courts liberally interpret this duty to protect seamen's rights.[31] Moreover, the Supreme Court affirmed an award of punitive damages against an employer for the willful and wanton refusal to pay maintenance and cure to an injured seaman in the recent case of *Townsend*.[32]

b. Unseaworthiness of the Vessel

Unseaworthiness is a theory of recovery based on a vessel owner's non-delegable duty to ensure that the vessel, its crew, and its appurtenances are

28. *Id. See* Lewis v. Lewis & Clark Marine, Inc., 531 U.S. 438, 441 (2001) ("A claim for maintenance and cure concerns the vessel owner's obligation to provide food, lodging, and medical services to a seaman injured while serving the ship."); Vella v. Ford Motor Co., 421 U.S. 1, 3 (1975); Vaughan v. Atkinson, 369 U.S. 527, 532 (1962). The remedy entitles a seaman to maintenance and cure until he reaches maximum cure or the point at which medical science can no longer improve the seaman's condition. *Vaughan*, 369 U.S at 538.

29. *See* Calmar S.S. Corp. v. Taylor, 303 U.S. 525, 527 (1938) ("The duty, which arises from the contract of employment, . . . does not rest upon negligence or culpability on the part of the owner or master.").

30. *Id.*

31. *See Vaughan*, 369 U.S. at 531–32; *see also* Harden v. Gordon, C.C., 11 F. Cas. 480, 485 (C.C.D. Me. 1823) (involving a crew member's claim for wages earned and sick expenses). In *Harden*, Justice Story remarked that "[e]very court should watch with jealousy an encroachment upon the rights of seamen, because they are unprotected and need counsel . . . . But courts of maritime law have been in the constant habit of extending towards them a peculiar, protecting favor and guardianship. They are emphatically the wards of the admiralty." *Harden*, 11 F. Cas at 485.

32. Atl. Sounding Co. v. Townsend, 557 U.S. 404 (2009).

reasonably fit for their intended use.[33] Furthermore, "the vessel and her owner are . . . liable to an indemnity for injuries received by seamen in consequence of the unseaworthiness of the ship, or a failure to supply and keep in order the proper appliances appurtenant to the ship."[34] The cause of action does not require that the vessel owner have knowledge of the unseaworthy condition.[35] The vessel need not be maintained in perfect condition; rather, it only must be reasonably fit for its intended purpose.[36]

To date, the Supreme Court has not considered whether a general maritime law claim for unseaworthiness may result in an award of punitive damages.[37] A divided Fifth Circuit sitting *en banc*, however, decided that such damages remain unavailable in the seaman's claim against the Jones Act employer.[38] Nonetheless, damages for unseaworthiness may be pursued against only the employer or the vessel owner to which the seaman was assigned, not from third parties.[39] Thus, the Fifth Circuit's *en banc McBride v. Estis Well Services, L.L.C.* decision does not apply to a seaman's general maritime law tort claim against third parties, who are neither employers nor vessel owners. With the growth of maritime commerce, Congress, in 1920, expanded the remedies available to those exposed to the "perils of the sea."[40]

2. The Seaman's Jones Act Negligence Claim

The Jones Act expanded the remedies available to a seaman.[41] The Jones Act effectively overruled a portion of the Supreme Court's prior decision in *The Osceola*[42] by granting seamen a cause of action for

33. *See* Colon v. Trinidad Corp., 188 F. Supp. 97 (S.D.N.Y. 1960); Vargas v. McNamara, 608 F.2d 15 (1st Cir. 1979).

34. The Osceola, 189 U.S. 158, 175 (1903).

35. Mitchell v. Trawler Racer, Inc., 362 U.S. 539, 549 (1960).

36. *See id.* at 550 ("The standard is not perfections, but reasonable fitness; not a ship that will weather every conceivable storm or withstand every imaginable peril of the sea, but a vessel reasonably suitable for her intended service.").

37. *See* Wade v. Clemco Indus. Corp., No. 16-502, 2017 WL 434425, at *4–6 (E.D. La. Feb. 1, 2017) (discussing punitive damage cases addressed by the Supreme Court in recent years).

38. *See* McBride v. Estis Well Serv., L.L.C., 768 F.3d 382 (5th Cir. 2014) (en banc), *cert. denied*, 135 S. Ct. 2310 (2015).

39. *See* Bridges v. Penrod Drilling, 740 F.2d 361, 364 (5th Cir. 1984).

40. *See* Chandris, Inc. v. Latsis, 515 U.S. 347, 354 (1995).

41. *See* Atl. Sounding Co. v. Townsend, 557 U.S. 404, 417 (2009).

42. The Osceola, 189 U.S. 158 (1903). The Court in this case stated,

> Upon a full review, however, of English and American authorities upon these questions, we think the law may be considered as settled upon the

negligence against their employer.[43] The remedy requires the existence of an employer-employee relationship between the seaman and the Jones Act employer.[44] The Jones Act did not eliminate other maritime causes of action or create a mutually exclusive right; it simply created a statutory right for the seaman to sue the employer for damages resulting from its negligence.[45] Twelve years before passing the Jones Act, Congress created an identical negligence cause of action in the Federal Employers' Liability Act ("FELA") for railway workers against their employers.[46] The Jones Act incorporated FELA by reference; therefore, cases interpreting FELA also apply to the Jones Act.[47]

> following propositions: 1. That the vessel and her owners are liable, in case a seaman falls sick, or is wounded, in the service of the ship, to the extent of his maintenance and cure, and to his wages, at least so long as the voyage is continued. 2. That the vessel and her owner are, both by English and American law, liable to an indemnity for injuries received by seamen in consequence of the unseaworthiness of the ship, or a failure to supply and keep in order the proper appliances appurtenant to the ship. 3. That all the members of the crew, except, perhaps, the master, are, as between themselves, fellow servants, *and hence seamen cannot recover for injuries sustained through the negligence of another member of the crew* beyond the expense of his maintenance and cure. 4. That the seaman is *not allowed to recover an indemnity for the negligence of the master*, or any member of the crew, but is entitled to maintenance and cure, whether the injuries were received by negligence or accident.

Id. at 175 (emphasis added).

43. *See* 46 U.S.C. § 30104 (2012) ("A seaman injured in the course of employment or, if the seaman dies from the injury, the personal representative of the seaman may elect to bring a civil action at law, with the right of trial by jury, against the employer. Laws of the United States regulating recovery for personal injury to, or death of, a railway employee apply to an action under this section.").

44. *See* Volyrakis v. M/V Isabella, 668 F.2d 863, 865–66 (5th Cir. 1982).

45. *Townsend*, 557 U.S. at 416. *See* McDermott Int'l, Inc. v. Wilander, 498 U.S. 337, 342 (1991).

46. *See* 45 U.S.C. § 51 ("Every common carrier by railroad while engaging in commerce . . . shall be liable in damage to any person suffering injury while he is employed by such carrier in such commerce, or in the case of the death of such employee, to his or her personal representative . . . for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reasons of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.").

47. *See* § 30104 ("Laws of the United States regulating recovery for personal injury to, or death of, a railway employee apply to an action under this section.").

Courts consistently hold that the Jones Act does not allow an award of punitive damages to the Jones Act seaman.[48] The Jones Act, however, applies only to a claim by a Jones Act seaman against his employer and "Congress has not addressed the issue of non-employer liability."[49] A claim by an injured plaintiff, who happens to be a seaman, against a non-employer does not implicate the Jones Act and should not trigger its limitation on damages.[50] The claim against the non-employer arises not from a seaman's status, but rather pursuant to general maritime law tort principles.

3. Causes of Action Available to Seamen Against Third Parties

In addition to the causes of action available to seamen against employers and vessel owners, general maritime law has long recognized various causes of action for maritime torts.[51] As long as the tort meets the test for admiralty jurisdiction,[52] the plaintiff may pursue a claim.[53] Seamen have various remedies at their disposal if they become injured.[54] Not only may they sue for claims arising from seaman status, but they also may sue any third party committing a tort cognizable by general maritime law or

48. *See* Miles v. Apex Marine Corp., 498 U.S. 19, 32 (1990) (discussing the history behind FELA and its pecuniary limitation); *see also* Bergen v. F/V St. Patrick, 816 F.2d 1345, 1347 (9th Cir. 1987), *opinion modified on reh'g*, 866 F.2d 318 (9th Cir. 1989) ("Punitive damages are non-pecuniary damages unavailable under the Jones Act."); Miller v. Am. President Lines, Ltd., 989 F.2d 1450, 1457 (6th Cir. 1993) ("It has been the unanimous judgment of the courts since before the enactment of the Jones Act that punitive damages are not recoverable under the Federal Employers' Liability Act. Punitive damages are not therefore recoverable under the Jones Act.").

49. Scarborough v. Clemco Indus., 391 F.3d 660, 667 (5th Cir. 2004), *cert. denied*, 544 U.S. 999 (2005).

50. *See* Collins v. A.B.C. Marine Towing, L.L.C., No. 14-1900, 2015 WL 5254710, at *4–5 (E.D. La. Sept. 9, 2015).

51. *See* Thomas v. Lane, 23 F. Cas. 957, 960 (C.C.D. Me. 1833) (Story, J.) ("The admiralty has not, and never (I believe) deliberately claimed to have any jurisdiction over torts, except such as are maritime torts, that is, such as are committed on the high seas, or on waters within the ebb and flow of the tide.").

52. *See supra* note 18.

53. *See, e.g.*, Kermarec v. Compagnie Generale Transatlantique, 358 U.S. 625, 630 (1959) (holding that a shipowner owes a duty of reasonable care towards persons lawfully aboard the vessel); E. River S.S. Corp. v. Transamerica Delaval, Inc., 476 U.S. 858, 865 (1986) (holding that general maritime law incorporated products liability law into its general principles).

54. *See supra* Part I.B.

any applicable state law for a land-based injury.[55] Nevertheless, a substantial debate has surfaced in maritime law regarding the remedies available in these various causes of action.

C. The Weather Started Getting Rough: Punitive Damages in Maritime Law

Punitive damages are defined as "damages assessed by way of penalizing the wrongdoer or making an example to others."[56] They operate as "private fines" intended to punish the defendant for reckless disregard for the safety of others or willful and wanton misconduct.[57] United States common law established the doctrine of punitive damages in its early history,[58] but admiralty law suffers from a long and complicated relationship with punitive damages both before the passage of the Jones Act and thereafter.

1. Pre-Jones Act Punitive Damages

Plaintiffs can recover punitive damages under common-law principles;[59] admiralty courts, however, did not clearly articulate and decide whether punitive damages were available in maritime law.[60] In early 19th century cases, the Supreme Court referenced a judge's ability to award "vindictive" or "exemplary" damages.[61] In an 1818 case involving the plundering of a vessel, *The Amiable Nancy*, Justice Story noted that if the plaintiffs had brought the suit against the original

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55. *See* 28 U.S.C. § 1333 (2012) ("The district courts shall have original jurisdiction, exclusive of the courts of the States, of . . . [a]ny civil case of admiralty or maritime jurisdiction, saving to suitors in all cases all other remedies to which they are otherwise entitled.").

56. *See Punitive Damages*, BLACK'S LAW DICTIONARY (10th ed. 2014).

57. Cooper Indus. v. Leatherman Tool, 532 U.S. 424, 432 (2001).

58. Day v. Woodworth, 54 U.S. 363, 371 (1851).

59. Atl. Sounding Co. v. Townsend, 557 U.S. 404, 409–10 (2009).

60. *See* David W. Robertson, *Punitive Damages in American Maritime Law*, 28 J. MAR. L. & COM. 73 *passim* (1997) (discussing historical maritime cases awarding punitive damages).

61. *See* The Amiable Nancy, 16 U.S. 546 *passim* (1818) (discussing exemplary and vindictive damages against the original wrongdoers for the robbery and plundering of a vessel); *see also* La Amistad De Rues, 18 U.S. 385 *passim* (1820) (referring to exemplary damages in a prize case); The Apollon, 22 U.S. 362, 374 (1824) (considering the possibility of vindictive damages in a vessel seizure case); The Palmyra, 25 U.S. 1, 9–10 (1827) (reviewing the possibility of vindictive damages in a prize case).

wrongdoers and not the shipowner, "proper punishment" consisting of exemplary damages would be warranted for such reprehensible misconduct.[62] Likewise, lower federal courts discussed the possibility of exemplary and vindictive damages in the maritime tort context.[63]

Furthermore, in the 1893 case of *Lake Shore & M. S. Ry. Co. v. Prentice*,[64] while discussing the availability of punitive or vindictive damages, the Supreme Court found that admiralty cases rely on the same common-law principles for awarding punitive damages.[65] Although most early cases discussing exemplary or vindictive damages did not actually award damages against the defendant, "that fact does not draw into question the basic understanding that punitive damages were considered an available maritime remedy."[66] Notwithstanding this early history, starting in the 20th century, Congress began to legislate comprehensively in the area of maritime law; consequently, seamen no longer needed to rely on common law and the federal courts to grant relief.[67] Because statutory maritime law preempts general maritime law,[68] many admiralty courts now look first to statutory maritime law, such as the Jones Act, as guidance for determining damage awards for seamen, including punitive damages.[69]

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62. *The Amiable Nancy*, 16 U.S. at 558.

63. *See* McGuire v. The Golden Gate, 16 F. Cas. 141, 143 (C.C. N.D. Cal. 1856) ("In an action against the perpetrator of the wrong, the aggrieved party would be entitled to recover not only actual damages but exemplary, such as would vindicate his wrongs, and teach the tort feasor the necessity of reform."); *see also* Ralston v. The State Rights, 20 F. Cas. 201, 209 (D.C. E.D. Pa. 1836) ("The damages which are called 'exemplary' are nothing more than a high and exaggerated estimate of the wrong or injury, which courts and juries take upon themselves to allow, bringing into calculation . . . something beyond the mere pecuniary loss or personal suffering."); Boston Mfg. Co. v. Fiske, 3 F. Cas. 957, 957 (C.C. Mass. 1820) ("In cases of marine torts, or illegal captures, it is far from being uncommon in the admiralty to allow costs and expences [sic], and to mulct the offending parties, even in exemplary damages, where the nature of the case requires it.").

64. Lake Shore & M. S. Ry. Co. v. Prentice, 147 U.S. 101 (1893).

65. *Id.* at 108 ("[C]ourts of admiralty . . . proceed, in cases of tort, upon the same principles as courts of common law, in allowing exemplary damages . . . for expenses incurred, or injuries or losses sustained, by the misconduct of the other party.").

66. Atl. Sounding Co. v. Townsend, 557 U.S. 404, 412 n.2 (2009).

67. Miles v. Apex Marine Corp., 498 U.S. 19, 27 (1990).

68. *See supra* note 11.

69. *Miles*, 498 U.S. at 31–32.

2. Post-Jones Act Punitive Damages

After the passage of the Jones Act and other statutory maritime law,[70] the inquiry before the courts began to shift as to whether such laws displaced general maritime law recovery available to seamen. Because Congress passed piecemeal rather than comprehensive statutes,[71] courts and judges were left to navigate through the unchartered waters of recovery and liability.

a. Taking Wind out of the Sails: From Loss of Society Damages to Punitive Damages

Several key cases from the Fifth Circuit and Supreme Court initiated a trend of restricting a seaman's recovery of certain damages, including loss of society[72] and other non-pecuniary damages.[73] Courts then classified punitive damages as non-pecuniary damages and disallowed the recovery of such awards.[74] These cases, whose subject matter ranged from wrongful death to unseaworthiness to Jones Act negligence, explored the interplay between general maritime law recovery and the preclusive effect of statutory maritime law.[75] This trend led some scholars to predict that seamen might no longer be able to recover punitive damages, but the Supreme Court rocked the boat in 2008 and 2009.[76]

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70. *See, e.g.*, Jones Act, 46 U.S.C. § 30104 (2012); Death on the High Seas Act, 46 U.S.C. § 30302; Admiralty Extension Act, 46 U.S.C. § 30101; Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 903.

71. *See* Jones Act, 46 U.S.C. § 30104 (not mentioning the type of damages recover under the Act). *But see* Death on the High Seas Act, 46 U.S.C. § 30302 (identifying only pecuniary damages as recoverable under the Act).

72. Loss of society is equivalent to the Louisiana concept of loss of consortium. See David W. Robertson, *Punitive Damages in U.S. Maritime Law:* Miles, Baker, *and* Townsend, 70 LA. L. REV. 463, 464–65 (2010), for a discussion of pecuniary and nonpecuniary damages.

73. *See infra* Part I.C.2.a.

74. *See infra* Part I.C.2.a.ii.

75. *See infra* Part I.C.

76. *See infra* Part I.C.2.c–d; *see also* David W. Robertson, *Punitive Damages in American Maritime Law*, *supra* note 60, at 163 ("Punitive damages are thus rapidly disappearing from maritime personal injury law."). *But see* Robertson, *Punitive Damages in U.S. Maritime Law:* Miles, Baker, *and* Townsend, *supra* note 72, at 463 ("In 1997 I wrote that '[p]unitive damages are . . . rapidly disappearing from maritime personal injury law.' It turns out this was a premature obituary.").

i. The Rising Tides of Denied Recovery: From DOHSA and Higginbotham *to the Jones Act and* Miles

Several key wrongful death cases decided both before and after the passage of the Jones Act began to slowly limit the recoveries available to seamen, culminating with *Mobil Oil Corp. v. Higginbotham*.[77] In 1978, the Supreme Court granted certiorari on the limited issue of whether the widows of passengers killed in a helicopter crash outside Louisiana's territorial waters could recover loss of society damages.[78] In *Higginbotham*, the Court needed to decide "which measure of damages to apply in a death action arising on the high seas—the rule chosen by Congress in 1920 [in the Death on the High Seas Act ("DOHSA")[79]] or the rule chosen by this Court in *Gaudet*."[80] Ignoring policy arguments, the *Higginbotham* Court noted that "Congress has struck the balance for us. It has limited survivors to recovery of their pecuniary losses."[81]

The Court recognized the need for uniformity in maritime law but explained that a desire for uniformity of recovery cannot prevail over the statute.[82] Even if the damages available in a wrongful death action in territorial waters would differ from the same action on the high seas, DOHSA controls and should be the primary guide in the Court's decision.[83] Although general maritime law may supplement statutory maritime law, "[t]here is a basic difference between filling a gap left by Congress' silence and rewriting rules that Congress has affirmatively and

77. Mobil Oil Corp. v. Higginbotham, 436 U.S. 618 (1978).

78. *Id.* at 620.

79. *See* 46 U.S.C. § 30302 (2012) ("When the death of an individual is caused by wrongful act, neglect, or default occurring on the high seas beyond 3 nautical miles from the shore of the United States, the personal representative of the decedent may bring a civil action in admiralty against the person or vessel responsible. The action shall be for the exclusive benefit of the decedent's spouse, parent, child, or dependent relative."). *See also* 46 U.S.C. § 30303 ("The recovery in an action under this chapter shall be a fair compensation for the *pecuniary loss* sustained by the individuals for whose benefit the action is brought. The court shall apportion the recovery among those individuals in proportion to the loss each has sustained.") (emphasis added).

80. *Higginbotham*, 436 U.S. at 623. *See* Sea-Land Servs., Inc. v. Gaudet, 414 U.S. 573, 587–88 (1974) (holding that a spouse could recover loss of society damages under general maritime law for the wrongful death of the decedent occurring in state territorial waters).

81. *Higginbotham*, 436 U.S. at 623.

82. *Id.*

83. *Id.* at 624.

specifically enacted."[84] Therefore, the Court limited the measure of damages in a wrongful death action occurring on the high seas to those pecuniary losses allowed by DOHSA.[85] After *Higginbotham*, the Supreme Court decided another wrongful death case, which left the waters of seaman recovery even murkier.

In 1990, the Supreme Court decided *Miles v. Apex Marine Corp*.[86] To establish a uniform rule applicable to all wrongful death causes of action, the Court held that the seaman's survivors could not recover loss of society damages in either a negligence action against the employer or an unseaworthiness action against a vessel owner.[87] The plaintiff brought suit against Apex Marine Corporation and several other defendants as owners of the vessel.[88] The plaintiff alleged that the decedent's Jones Act employer negligently failed to prevent the death of her son.[89] In addition, the plaintiff contended that the defendant breached the general maritime law warranty of seaworthiness of the vessel.[90] The plaintiff sought several categories of damages, including loss of society.[91]

The Court considered whether the Jones Act had the same preclusive effect on recovery as DOHSA.[92] The Court first turned to *Higginbotham* for guidance.[93] Traditionally, if Congress leaves an area of the law open, admiralty courts supplement applicable maritime statutes.[94] *Higginbotham*, however, reasoned that "in an 'area covered by the statute, it would be no more appropriate to prescribe a different measure of damages than to prescribe a different statute of limitations, or a different class of beneficiaries.'"[95] The Court found that the principle of *Higginbotham* controlled the case before it[96] and then turned to the preemptory effect of the Jones Act on the recoverability of loss of society damages in a wrongful death action against the Jones Act employer.[97]

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84. *Id.* at 625.
85. Miles v. Apex Marine Corp., 498 U.S. 19, 21 (1990).
86. *Id.*
87. *Id.* at 32–33.
88. *Id.* at 21.
89. *Id.* A member of the crew of the M/V Archon stabbed the decedent multiple times. *Id.*
90. *Id.* Plaintiff contended the vessel was unseaworthy because the defendant hired a crew member unfit to serve. *Id.*
91. *Id.* at 21–22.
92. *Id.* at 31.
93. *Id.* at 31–33; *see also* Mobil Oil Corp. v. Higginbotham, 436 U.S. 618 (1978).
94. *Higginbotham*, 436 U.S. 618 at 625.
95. *Miles*, 498 U.S. at 31 (quoting *Higginbotham*, 439 U.S. at 625).
96. *Id.* at 32.
97. *Id.*

The Supreme Court examined the history and purpose of the Jones Act.[98] In 1920, Congress enacted the Jones Act to overrule *The Osceola*[99] and create a statutory negligence cause of action for the death or injury of a seaman against his employer.[100] Notably, "[t]he Jones Act evinces no general hostility to recovery under [general] maritime law."[101] The statute merely aimed to establish a uniform system of seaman tort law identical to the tort remedies available to railway employees under FELA.[102]

Because the Jones Act incorporated FELA by reference, the *Miles* Court examined FELA to determine if loss of society damages were available in a FELA wrongful death cause of action.[103] By its clear statutory language, FELA declares that employers "shall be liable in damages."[104] Earlier cases interpreting FELA wrongful death actions, however, had held that recoverable damages were limited to pecuniary losses against the employer.[105] Relying on this limitation, the *Miles* Court concluded that when Congress passed the Jones Act, incorporating FELA unaltered and its progeny, Congress intended to impose a pecuniary limitation in the Jones Act wrongful death action as well.[106] Therefore, because FELA precluded a wrongful death award of damages for loss of society, its identical

98. *Id.* at 29.

99. The Osceola, 189 U.S. 158 (1903).

100. Lewis v. Lewis & Clark Marine, Inc., 531 U.S. 438, 441 (2001).

101. *Miles*, 498 U.S. at 32 (quoting *Higginbotham*, 436 U.S. 618 at 625).

102. *Id.* at 29 ("Rather, the Jones Act establishes a uniform system of seamen's tort law parallel to that available to employees of interstate railway carriers under FELA.").

103. *Id.*

104. *See* 45 U.S.C. §§ 51–60 (2012) ("Every common carrier by railroad while engaging in commerce . . . shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or in the case of the death of such employee, to his or her personal representative . . . for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reasons of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.").

105. *See* Mich. Cent. R. Co. v. Vreeland, 227 U.S. 59, 70–71 (1913) (holding that in a wrongful death action FELA limited the plaintiff's recovery to pecuniary damages, which did not include "damages by way of recompense for grief or wounded feelings" nor the loss of society of the companion); *see also* David W. Robertson, *Punitive Damages in U.S. Maritime Law:* Miles, Baker, *and* Townsend, *supra* note 72, at 464–65 ("Pecuniary compensatory damages are those that are measurable in money, at least notionally. In personal injury cases, the standard pecuniary categories of compensatory damages are lost earnings and earning capacity and medical and related expenses.") (emphasis omitted).

106. *Miles*, 498 U.S. at 32.

counterpart—the Jones Act—also precluded the recovery of non-pecuniary damages.[107]

The *Miles* Court then extended this limitation of damages. The plaintiff's claim rested not only on the Jones Act but also on a general maritime law claim for unseaworthiness.[108] The Court, however, concluded that the close relationship between the Jones Act and unseaworthiness prohibited recovery of non-pecuniary damages in this separate cause of action as well. Because Congress did not allow recovery of loss of society damages in a cause of action that requires a showing of fault under the Jones Act, it would be inappropriate for the Supreme Court to allow a more expansive remedy in the judicially created unseaworthiness action, which requires no showing of fault.[109] Because statutory maritime law precluded the recovery of loss of society in a wrongful death action, general maritime law also precluded these damages to achieve a uniform rule in maritime law for wrongful death causes of action.[110]

Although the *Miles* decision did not contemplate the issue of punitive damages, many subsequent courts expanded the *Miles* uniformity principle to preclude awarding punitive damages to seamen.[111] Many courts interpreted non-pecuniary damages to include punitive damages and therefore disallowed their recovery under the Jones Act.[112]

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107. *Id.* ("When Congress passed the Jones Act, the *Vreeland* gloss on FELA, and the hoary tradition behind it, were well established. Incorporating FELA unaltered into the Jones Act, Congress must have intended to incorporate the pecuniary limitation on damages as well. We assume that Congress is aware of existing law when it passes legislation."). Therefore, because FELA did not allow recovery of loss of society damages, its counterpart, the Jones Act, also did not allow such damages. *Id.*; *see also* Cannon v. Univ. of Chi., 441 U.S. 677, 696–97 (1979) ("It is always appropriate to assume that our elected representatives, like other citizens, know the law.").

108. *Miles*, 498 U.S. at 32.

109. *Id.*

110. *Id.* at 32–33.

111. *See* McBride v. Estis Well Serv., L.L.C., 768 F.3d 382 (5th Cir. 2014), *cert. denied*, 135 S. Ct. 2310 (2015) (denying the recovery of punitive damages in an unseaworthiness cause of action); Bergen v. F/V St. Patrick, 816 F.2d 1345, 1347 (9th Cir. 1987), *opinion modified on reh'g*, 866 F.2d 318 (9th Cir. 1989) ("Punitive damages are non-pecuniary damages unavailable under the Jones Act."); Miller v. Am. President Lines, Ltd., 989 F.2d 1450, 1457 (6th Cir. 1993) ("Punitive damages are not therefore recoverable under the Jones Act.").

112. *See* David W. Robertson, *Punitive Damages in American Maritime Law*, *supra* note 60, at 143–55 (discussing cases denying punitive damages based on *Miles*). See also Phillip M. Smith, Comment, *A Watery Grave for Unseaworthiness Punitive*

ii. Sailing Miles *Too Far*

In 1995, the Fifth Circuit expanded the *Miles* pecuniary damage limitation to deny a seaman the right to recover punitive damages in a maintenance and cure cause of action.[113] In *Guevara v. Maritime Overseas Corporation*, the seaman-plaintiff filed suit against his employer, alleging negligence under the Jones Act and an unseaworthiness claim under general maritime law.[114] In addition, Guevara requested punitive damages for his employer's failure to pay maintenance and cure.[115]

On appeal, the Fifth Circuit, sitting *en banc*, reversed the trial court's award of punitive damages and extended the reasoning of *Miles* in finding that general maritime law does not permit an award of punitive damages for the willful refusal to pay maintenance and cure.[116] In so doing, the Fifth Circuit overruled *Holmes v. J. Ray McDermott & Co.*[117] and *In re Merry Shipping*.[118] In *Merry Shipping*, the Fifth Circuit held that even if punitive damages were not available under the Jones Act, it did not follow that punitive damages also would be unavailable under general maritime law for an unseaworthiness claim.[119] Revisiting the same issue 14 years later, the Fifth Circuit in *Guevara* reasoned that in light of the *Miles* decision, the analysis of *Merry Shipping* was no longer sound.[120]

Adopting the analytical framework of *Miles*, the Fifth Circuit articulated a test for whether *Miles* applies to a case to limit damages. The court must first analyze the factual setting of the case at hand.[121] If a federal statute applies and directs or limits the recovery available in the situation, then, the statute controls.[122] Furthermore, the applicable statute also

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Damages: McBride v. Estis Well Service, L.L.C., 76 LA. L. REV. 619, 635–38 (2015), for a discussion of the analogy from loss of society damages to punitive damages.

113. *See* Guevara v. Mar. Overseas Corp., 59 F.3d 1496, 1513 (5th Cir. 1995) (en banc), *abrogated by* Atl. Sounding Co. v. Townsend, 557 U.S. 404 (2009).

114. *Id.* at 1499.

115. *Id.*

116. *Id.* at 1496.

117. Holmes v. J. Ray McDermott & Co., 734 F.2d 1110 (5th Cir. 1984) (holding that the court may award punitive damages under general maritime law if the employer willfully and callously refuses to pay maintenance and cure to a seaman).

118. *In re* Merry Shipping, Inc., 650 F.2d 622, 626 (5th Cir. 1981) (holding the court may award punitive damages under general maritime law for an unseaworthiness cause of action).

119. *Id.*

120. *Guevara*, 59 F.3d at 1504. *See supra* Part I.C.2.a.i.

121. *Guevara*, 59 F.3d at 1506.

122. *Id.*

precludes or limits the recovery available under general maritime law.[123] The Fifth Circuit found that "[a]lthough the *Miles* Court did not mention punitive damages, they are also rightfully classified as non-pecuniary."[124] Therefore, even though the *Miles* Court did not address punitive damages, the Fifth Circuit in *Guevara* expanded *Miles* to preclude the recovery of those damages.

Applying this test, the Fifth Circuit concluded that maintenance and cure actually involves two types of actions.[125] The "tort-like" maintenance and cure action requires personal injury and the "contract-like" action may, but need not, involve personal injury.[126] Because the tort-like maintenance and cure action includes personal injury, it "overlaps with the personal injury coverage of the Jones Act"[127] and therefore invokes the *Miles* uniformity of damages principle.

Guevara, however, brought a "contract-like" maintenance and cure cause of action.[128] Even though no statutory overlap existed because the claim did not involve personal injury, "[the Fifth Circuit] believe[d] that punitive damages should not be available in any action for maintenance and cure, even in those contract-like actions that can only be brought under the general maritime law."[129] The Fifth Circuit's concern with uniformity precluded an award of punitive damages in both types of maintenance and cure actions; therefore, a seaman no longer possessed a claim for punitive damages for willful nonpayment of maintenance and cure under general maritime law.[130] In a subsequent case, the Fifth Circuit expanded this reasoning to preclude an award of non-pecuniary damages in another, completely separate cause of action that neither requires nor contemplates an employment relationship.

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123. *Id.* Stated another way, the Fifth Circuit explained,

> [A] court must first evaluate the factual setting of the case and determine what statutory remedial measure, if any, apply in that context. If the situation is covered by a statute like the Jones Act or DOHSA, and the statute informs and limits the available damages, the statute directs and delimits the recovery available under the general maritime law as well.

Id.

124. *Id.* (citing Wahlstrom v. Kawasaki Heavy Indus., Ltd., 4 F.3d 1084, 1094 (2d Cir. 1993), *cert. denied*, 510 U.S. 1114 (1994)).

125. *Id.* at 1511.

126. *Id.*

127. *Id.*

128. *Id.*

129. *Id.* at 1512.

130. *Id.* at 1513.

b. Uncharted Waters: Applying Miles *to a Separate and Distinct Cause of Action*

In 2005, the Fifth Circuit, armed with the *Miles* uniformity principle and *Guevara*, concluded that neither a Jones Act seaman nor his survivors could recover non-pecuniary losses against a third-party non-employer.[131] From 1958 until 1967, William Scarborough worked aboard sandblasting vessels for two companies.[132] Ten years after ending his employment as a sandblaster, Scarborough discovered that his exposure to siliceous particles during his employment caused him to contract silicosis.[133] Scarborough passed away from his illness in March 2002.[134]

Following his death, Scarborough's wife and adult children instituted a wrongful death suit against several defendants, seeking pecuniary and non-pecuniary damages.[135] The United States District Court for the Eastern District of Louisiana concluded that under the *Miles* uniformity principle, a Jones Act seaman's survivors could not recover non-pecuniary damages from a third party non-employer.[136] The plaintiffs subsequently appealed to the Fifth Circuit.[137]

The Fifth Circuit reviewed whether the *Miles* uniformity principle precluded the recovery of non-pecuniary damages.[138] The court reiterated that *Miles* disallowed the recovery of loss of society damages in a general maritime wrongful death action to "'restor[e] a uniform rule applicable to all actions for the wrongful death of a seaman.'"[139] The plaintiffs attempted to distinguish *Miles* by arguing that the defendants were third-party non-employers, thereby not invoking the Jones Act.[140] The Fifth Circuit turned to its earlier decision, *Guevara*, for guidance on this issue.

The Fifth Circuit reiterated the *Guevara* test of when the *Miles* uniformity principle limits the recovery of damages.[141] If the factual situation implicates a statutory remedial measure and that statute limits

131. Scarborough v. Clemco Indus., 391 F.3d 660, 663 (5th Cir. 2004), *cert. denied*, 544 U.S. 999 (2005).
132. *Id.*
133. Scarborough v. N. Assurance Co. of Am., 718 F.2d 130, 132 (5th Cir. 1983).
134. *Id.*
135. *Scarborough*, 391 F.3d at 663.
136. Scarborough v. Clemco Indus., 264 F. Supp. 2d 437, 447 (E.D. La. 2003), *aff'd*, 391 F.3d 660 (5th Cir. 2004).
137. *Scarborough*, 391 F.3d at 663.
138. *Id.* at 666.
139. *Id.* (quoting Miles v. Apex Marine Corp., 498 U.S. 19, 32 (1990)).
140. *Id.* at 667.
141. *See supra* Part I.C.2.a.ii.

recovery, then the recovery under general maritime law also will be limited.[142] The *Guevara* principles could not be met in this factual setting because the plaintiffs brought suit against a third-party non-employer and not the Jones Act employer.[143] Even if the *Guevara* principles for application of *Miles* did not apply, however, *Guevara* still controlled the issue before the court.[144] In *Guevara*, the court found that even though a congressional statute did not directly apply, the statute should apply to "highly analogous factual scenarios."[145] Additionally, courts should not allow a greater remedy in a judicially created cause of action than Congress allowed in the related remedial scheme. Therefore, the concern for uniformity in federal maritime law discouraged allowing recovery of a type of damages in one class of actions but not in another.[146]

A panel of the Fifth Circuit, applying the *Guevara* reasoning, determined that the *Scarborough* plaintiffs' action against a non-employer maritime tortfeasor was analogous to a Jones Act negligence claim against the employer.[147] Just as Congress disallowed the recovery of non-pecuniary damages in a Jones Act suit, the court determined that it would be inappropriate to award identical damages to the surviving spouse and heirs in an analogous suit against the third-party tortfeasor—the manufacturers of siliceous materials.[148] The Fifth Circuit would not ignore the "bright line directive of *Miles*" that limits recovery to pecuniary damages.[149] *Miles* "is concerned with uniformity in the damages recoverable by a Jones Act seaman and his survivors, not with uniformity of the types of damages to which various defendants are subjected."[150] Relying on its *Guevara* analysis of *Miles*, the court ultimately found that neither a Jones Act seaman nor his survivors may recover non-pecuniary damages from third-party non-employers.[151] But the Supreme Court since has eroded plaintiff recovery limitations under general maritime law.

142. *See supra* Part I.C.2.a.ii.
143. *Scarborough*, 391 F.3d at 668.
144. *Id.*
145. *Id.*
146. *Id.*
147. *Id.*
148. *Id.*
149. *Id.*
150. *Id.*
151. *Id.*

c. Punitive Damages Under General Maritime Law

On March 24, 1989, the supertanker *Exxon Valdez*, supervised by Captain Joseph Hazelwood, ran aground on a reef along the Alaskan coast.[152] The collision ruptured the ship's hull, and it spilled millions of gallons of oil into the Prince William Sound.[153] After Exxon settled claims for environmental damage, commercial fishermen and native Alaskans brought suit for economic losses to their livelihoods, which were dependent on the Sound.[154]

At the district court level, a class of plaintiffs sought punitive damages from Exxon.[155] The jury heard evidence of Exxon's management's acts and omissions relevant to the spill, including Exxon's knowledge of Captain Hazelwood's alcohol addiction and subsequent relapse.[156] The court instructed the jury on the purpose of punitive damages and asked the jury to consider "the reprehensibility of the defendants' conduct, their financial condition, the magnitude of the harm, and any mitigating facts" in awarding any punitive damages.[157] The jury awarded $5,000 in punitive damages against Hazelwood and $5 billion against Exxon.[158] On appeal, the Ninth Circuit Court of Appeals lowered the award against Exxon to $2.5 billion.[159] The Supreme Court granted certiorari to consider whether the punitive damages award was (1) permissible; and, if so, (2) excessive under maritime common law.[160]

152. Exxon Shipping Co. v. Baker, 554 U.S. 471, 476 (2008).

153. *Id.*

154. *Id.*

155. *Id*. at 481.

156. *Id*. at 476–77 ("According to the District Court, '[t]here was evidence presented to the jury that after Hazelwood was released from [residential treatment], he drank in bars, parking lots, apartments, airports, airplanes, restaurants, hotels, at various ports, and aboard Exxon tankers.'"). Hours after the collision, the Coast Guard tested Hazelwood's blood alcohol level, and experts estimated his blood-alcohol level at the time of the crash to be around .241–three times the legal limit for driving in a majority of states. *Id*.

157. *Id*. at 481.

158. *Id.*

159. *In re* Exxon Valdez, 270 F.3d 1215, 1246 (9th Cir. 2001).

160. *Baker*, 554 U.S. at 481. The Court also considered whether maritime law allows corporate liability for punitive damages based on agency principles and whether the Clean Water Act precluded the award of punitive damages in maritime spill cases. *Id.*

Considering whether the award was permissible, the Supreme Court began its analysis with a historical overview of punitive damages.[161] Courts throughout the United States frequently award exemplary or punitive damages in addition to compensatory damages, and "the consensus today is that punitives are aimed not at compensation but principally at retribution and deterring harmful conduct."[162] After determining that the only applicable federal statute did not preclude an award of punitive damages, the Court affirmed the award of punitive damages under general maritime law but reduced the amount as excessive.[163] One year later, the Court addressed whether a Jones Act seaman could recover punitive damages against his employer.[164]

d. Seamen Can Recover Punitive Damages from Their Employer

In 2009, the Supreme Court decided a landmark case involving punitive damages in a seaman's claim against his Jones Act employer. In *Atlantic Sounding Co., Inc. v. Townsend*, the Court held that a Jones Act seaman could recover punitive damages against his employer for a willful and wanton disregard of its general maritime obligation to pay maintenance and cure benefits to a seaman.[165] The plaintiff, Edgar L. Townsend, worked as a crewmember of a tugboat.[166] While aboard the vessel, the plaintiff fell on the steel deck and injured his arm and shoulder.[167] After the accident, the plaintiff claimed that his employer, Atlantic Sounding Co., Inc., advised him that it would not provide maintenance and cure.[168] Townsend filed suit against his employer, alleging negligence under general maritime law and the Jones Act, unseaworthiness, "arbitrary and willful failure to pay maintenance and cure," and wrongful termination.[169] The plaintiff also

161. *Id*. at 490–91 ("[P]unitive damages were a common law innovation untethered to strict numerical multipliers, and the doctrine promptly crossed the Atlantic to become widely accepted in American courts by the middle of the 19th century.") (internal citations omitted).

162. *Id*. at 492.

163. *Id.* at 476.

164. *See* David W. Robertson, *Punitive Damages in U.S. Maritime Law:* Miles, Baker, *and* Townsend, *supra* note 72, at 476–77.

165. Atl. Sounding Co. v. Townsend, 557 U.S. 404, 424–25 (2009).

166. *Id.* at 407.

167. *Id.*

168. *Id*. The employer filed an action for declaratory relief in connection to its duty to pay maintenance and cure. *Id.* at 408.

169. *Id.* at 408.

sought punitive damages for the employer's denial of maintenance and cure.[170]

The Court relied on three arguments to allow the recovery of punitive damages.[171] First, punitive damages "have long been an available remedy at common law for wanton, willful, or outrageous conduct."[172] The Court cited multiple cases dating back from 17th-century England to 19th-century America indicating the jury's ability to award any damages it sees fit, including punitive damages.[173] Furthermore, the Court pointed out several cases in which it acknowledged the common-law doctrine of punitive damages.[174] Second, the Court extended this common-law doctrine to claims arising under general maritime law.[175] Third, the Court examined the historical recognition of a seaman's right to maintenance and cure and determined that statutory federal admiralty law did not preclude the application of this doctrine of punitive damages to a claim in the maintenance and cure context.[176]

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170. *Id.*

171. *Id.* at 424–25.

172. *Id.* at 409.

173. *Id.* at 411–12.

174. *Id.* at 410. *See* Day v. Woodworth, 54 U.S. 363, 371 (1851) ("It is a well-established principle of the common law . . . a jury may inflict what are called exemplary, punitive, or vindictive damages upon a defendant, having in view the enormity of his offence rather than the measure of compensation to the plaintiff."); Phila., W. & B.R. Co. v. Quigley, 62 U.S. 202, 214 (1858) ("Whenever the injury complained of has been inflicted maliciously or wantonly, and with circumstances of contumely or indignity, the jury are not limited to the ascertainment of a simple compensation for the wrong committed against the aggrieved person."); Barry v. Edmunds, 116 U.S. 550, 562 (1886) ("In addition, according to the settled law of this court, [the plaintiff] might show himself, by proof of the circumstances, to be entitled to exemplary damages calculated to vindicate his right and protect it against future similar invasions.").

175. *Townsend*, 557 U.S. at 411. *See* Lake Shore & Mich. S. Ry. Co. v. Prentice, 147 U.S. 101, 108 (1893) ("The rule . . . is not peculiar to courts of admiralty; for . . . those courts proceed, in cases of tort, upon the same principles as courts of common law, in allowing exemplary damages, as well as damages by way of compensation or remuneration for expenses incurred, or injuries or losses sustained, by the misconduct of the other party."); *see also* Boston Mfg Co. v. Fiske, 3 F. Cas. 957 (C.C.D. Mass. 1820) ("In cases of marine torts . . . it is far from being uncommon in the admiralty to allow costs and expences [sic], and to mulct the offending parties, even in exemplary damages, where the nature of the case requires it. Courts of admiralty allow such items . . . but upon the same principles, as they are often allowed damages in cases of torts, by courts of common law, as a recompense for injuries sustained, as exemplary damages.").

176. *Townsend*, 557 U.S. at 412–14.

Significantly, the Court explained that nothing in the Jones Act indicated any deviance from this common-law doctrine.[177] Looking at the text of the Jones Act, the Court concluded that it "created a statutory cause of action for negligence, but it did not eliminate pre-existing remedies available to seamen for the separate common-law cause of action based on a seaman's right to maintenance and cure."[178] The Jones Act gives a seaman the ability to elect to bring a claim against his employer for negligence; thus, neither the language of the Jones Act nor its jurisprudential progeny bar the recovery of punitive damages in a maintenance and cure claim.[179]

The Court then turned to the so-called *Miles* principle of uniformity.[180] The Court distinguished that *Miles* arose from a general maritime law wrongful death cause of action based on the unseaworthiness of the vessel.[181] Although the "reasoning of *Miles* remain[ed] sound,"[182] the Court found that it did not apply to the case at hand because neither the Death on the High Seas Act[183] nor the Jones Act addressed a seaman's right to maintenance and cure.[184] Because "no statute [cast] doubt on their availability under general maritime law,"[185] the seaman-plaintiff would be entitled to recover punitive damages under general maritime law for the employer's arbitrary and willful failure to pay maintenance and cure.[186] Although the *Miles* decision predicated its reasoning on the maritime principle of uniformity, the Court undermined that notion by stating, "[t]he laudable quest for uniformity in admiralty does not require the narrowing of available damages to the lowest common denominator approved by Congress for *distinct* causes of action."[187] The Court's decision expressly

177. *Id.* at 415.
178. *Id.* at 415–16.
179. *Id.*
180. *Id.* at 418.
181. *Id.* at 419. *See* Miles v. Apex Marine Corp., 498 U.S. 19 (1990).
182. *See Miles*, 498 U.S. 19, 36–37 (holding that because loss of society is unavailable in a Jones Act seaman wrongful death claim then loss of society damages must also be unavailable in a general maritime law unseaworthiness wrongful death cause of action).
183. *See* 46 U.S.C. § 30302 (2012) ("When the death of an individual is caused by wrongful act, neglect, or default occurring on the high seas beyond 3 nautical miles from the shore of the United States, the personal representative of the decedent may bring a civil action in admiralty against the person or vessel responsible. The action shall be for the exclusive benefit of the decedent's spouse, parent, child, or dependent relative.").
184. *Townsend*, 557 U.S. at 419.
185. *Id.* at 421.
186. *Id.* at 425.
187. *Id.* at 424 (emphasis added).

abrogated the Fifth Circuit decision in *Guevara*,[188] which the *Scarborough* court notably relied heavily upon to expand the *Miles* uniformity principle to third-party tortfeasors in a distinct cause of action.[189]

Townsend potentially parted the seas for a Jones Act seaman to recover punitive damages under general maritime law. The Court limited its decision to the narrow issue of punitive damages in the maintenance and cure context, leaving unanswered whether seamen can recover punitive damages in other contexts.[190] The Supreme Court, however, provided a key analytical framework for determining the recovery of punitive damages based on three inquiries.[191] First, does the cause of action invoke any directly applicable federal statute? Second, did the cause of action preexist the federal statute? Finally, does the applicable federal statute displace an award of punitive damages?[192]

After *Townsend*, in *McBride v. Estis Well Service, L.L.C.*, the *en banc* Fifth Circuit held that even though the seaman-plaintiff's general maritime law unseaworthiness claim did not invoke statutory maritime law, the plaintiff could not recover punitive damages from his employer.[193] Relying on *Miles*, the court concluded that the Jones Act limited a seaman's recovery to pecuniary losses when liability arose from the Jones Act or unseaworthiness.[194] Moreover, the court found that punitive damages should be classified as non-pecuniary and therefore unrecoverable.[195] The Supreme Court denied certiorari.[196]

In the context of a cause of action against a third-party non-employer, however, neither unseaworthiness nor the Jones Act apply. The general maritime tort cause of action against a third party is wholly and distinctly

188. Guevara v. Mar. Overseas Corp., 59 F.3d 1496, 1513 (5th Cir. 1995), *abrogated by* Atl. Sounding Co. v. Townsend, 557 U.S. 404 (2009).

189. Scarborough v. Clemco Indus., 391 F.3d 660, 667 (5th Cir. 2004), *cert. denied*, 544 U.S. 999 (2005).

190. McBride v. Estis Well Serv., L.L.C., 768 F.3d 382 (5th Cir. 2014) (en banc), *cert. denied*, 135 S. Ct. 2310 (2015) (considering the availability of punitive damages in an unseaworthy action); Batterton v. Dutra Grp., No. 15-56775, 2018 WL 505256 (9th Cir. 2018) (considering the same issue as *McBride*).

191. *Townsend*, 557 U.S. at 424–25.

192. *Id.*

193. *McBride*, 768 F.3d at 390–91 (holding neither a seaman nor his survivors could recover punitive damages in a general maritime law unseaworthiness cause of action).

194. *Id.* at 384.

195. *Id.*

196. McBride v. Estis Well Serv., L.L.C., 135 S. Ct. 2310 (2015).

separate from the Jones Act and unseaworthiness.[197] A claim against a third-party non-employer necessarily requires a different analytical approach than courts adopt in a cause of action against the Jones Act employer. Neither *McBride* nor *Townsend* involved third-party tortfeasor liability, leaving a whirlpool of unanswered questions for lower courts to navigate.

II. A SHIPWRECK IN THE EASTERN DISTRICT OF LOUISIANA

Recently, several judges in the United States District Court for the Eastern District of Louisiana addressed whether a seaman may recover punitive damages against a non-employer third party based on a general maritime law tort claim.[198] Two judges, interpreting United States Supreme Court precedent, held that punitive damages remain available to seamen in their general maritime law claims against third parties.[199] Other judges, adhering to *Scarborough*,[200] refused to allow recovery of these damages.[201] The same judge that first held that seamen could recover punitive damages changed course, however, and held the exact opposite two years later.[202] As of now, a maritime plaintiff's ultimate recovery in the Eastern District could be determined simply based on which judge the court assigns to the case. The uncertainty caused by this split should

197. *See* Smith, *supra* note 112, at 635–38 (providing an in-depth analysis of *McBride*, its holding, and its legacy).

198. *See* Collins v. A.B.C. Marine Towing, L.L.C., No. 14-1900, 2015 WL 5254710 (E.D. La. Sept. 9, 2015) (Fallon, J.); Hume v. Consol. Grain & Barge, Inc., No. 15-0935, 2016 WL 1089349 (E.D. La. Mar. 21, 2016) (Zainey, J.); Howard v. Offshore Liftboats, L.L.C., No. 13-4811, 2015 WL 7428581 (E.D. La. Nov. 20, 2015) (Morgan, J.). All judges referenced in Part II preside in the Eastern District of Louisiana.

199. *See Collins*, 2015 WL 5254710 (Fallon, J.); *Hume*, 2016 WL 1089349 (Zainey, J.). *But see* Wade v. Clemco Indus. Corp., No. 16-502, 2017 WL 434425 (E.D. La. Feb. 1, 2017) (Fallon, J.) (Judge Fallon changing course and disallowing punitive damages based on *Scarborough*).

200. Scarborough v. Clemco Indus., 391 F.3d 660 (5th Cir. 2004), *cert. denied*, 544 U.S. 999 (2005) (holding that neither a Jones Act seaman nor his survivors could recover non-pecuniary damages from third parties).

201. *Howard*, 2015 WL 7428581 (E.D. La. Nov. 20, 2015) (Morgan, J.); Rockett v. Belle Chasse Marine Trans., L.L.C., No. 17-229, 2017 WL 2226319 (E.D. La. May 22, 2017) (Lemmon, J.); Rinehart v. Nat'l Oilwell Varco L.P., No. 15-6266, 2017 WL 1407699 (E.D. La. Apr. 20, 2017) (Fallon, J.); Schutt v. All. Marine Servs. L.P., No. 16-15733, 2017 WL 2313199 (E.D. La. May 26, 2017) (Lemelle, J.).

202. *Wade*, 2017 WL 434425 (Fallon, J.).

motivate the Fifth Circuit, *en banc*, to clarify its prior precedent or overrule *Scarborough*.

A. Collins v. A.B.C. Marine Towing, L.L.C.

On August 13, 2014, a vessel towing a crane barge allided[203] with the Florida Avenue lift bridge in the Inner Harbor Navigational Canal in Orleans Parish.[204] The mast of the crane barge hit the bridge and caused the crane boom to crash onto the pilot house, killing Michael Collins, a barge worker.[205]

Collins's widow brought suit against her husband's Jones Act employer/vessel owner, alleging negligence and unseaworthiness.[206] The widow also brought suit for negligence under general maritime law against the owner of the crane barge and the Port of New Orleans ("Port") as owner and operator of the lift bridge.[207] The plaintiff sought punitive damages from the Port, alleging gross negligence.[208] The Port argued that the Jones Act and general maritime law precluded an award of punitive damages.[209]

Judge Fallon noted that the decedent was a Jones Act seaman killed in Louisiana territorial waters by the alleged gross negligence of a third-party tortfeasor who did not employ the seaman.[210] Therefore, the claim arose under general maritime law.[211] The Port argued that the plaintiff could not recover punitive damages from it based on *Miles*, *McBride*, and *Scarborough*.[212] The plaintiff contended that none of the three cases were

203. *See Allision*, BLACK'S LAW DICTIONARY (10th ed. 2014) (defining "allision" as "the contact of a vessel with a stationary object such as an anchored vessel or a pier").

204. *Collins*, 2015 WL 5254710, at *1.

205. *Id.*

206. *Id.*

207. *Id.*

208. *Id.*

209. *Id.*

210. *Id.* at *2.

211. *Id.*

212. *See* Miles v. Apex Marine Corp., 498 U.S. 19 (1990) (holding there is no recovery for loss of society in a general maritime action for the wrongful death of a Jones Act seaman); McBride v. Estis Well Serv., L.L.C., 768 F.3d 382 (5th Cir. 2014) (en banc), *cert. denied*, 135 S. Ct. 2310 (2015) (holding that neither a seaman nor his survivors could recover punitive damages in a general maritime law unseaworthiness cause of action); Scarborough v. Clemco Indus., 391 F.3d 660 (5th Cir. 2004), *cert. denied*, 544 U.S. 999 (2005) (holding that neither a Jones Act seaman nor his survivors could recover non-pecuniary damages from third parties).

dispositive.[213] Therefore, the court needed to decide whether a seaman's limited right to recover only pecuniary damages against his employer, established in *Miles* and affirmed in *McBride*, extended to a non-employer third-party tortfeasor.[214]

After discussing the reasoning of *Townsend*,[215] Judge Fallon concluded that the Jones Act had no bearing on the plaintiff's claim against a non-employer defendant.[216] *McBride* and *Miles* precluded recovery of non-pecuniary damages only from the seaman's employer, not as against a third-party tortfeasor under general maritime law.[217] Judge Fallon concluded that in a general maritime law claim against a third party non-employer, it made no difference whether the plaintiff was a "seaman, a longshoreman or a passenger," and "there [was] no need for uniform treatment of an employer and a third party tortfeasor where there is no statutory remedy that is different than the general maritime law remedy."[218]

The plaintiff's status as a seaman was irrelevant in a suit against a third-party tortfeasor; the only relevant inquiry was whether the seaman's personal representative could assert a claim for punitive damages based on gross negligence under general maritime law.[219] Citing *Townsend* and *Baker*,[220] Judge Fallon concluded that general maritime law did allow the plaintiff to recover punitive damages from a non-employer third party.[221]

Judge Fallon then discussed this issue in light of *Scarborough*.[222] In *Scarborough*, the Fifth Circuit held "that neither one who has invoked his Jones Act seaman status nor his survivors may recover nonpecuniary damages from non-employer third parties."[223] Judge Fallon noted that *Scarborough* relied on *Guevara*[224] to expand *Miles* to eliminate the seaman's potential punitive damage recovery from third parties.[225] Although *Scarborough* theoretically binds district courts within the Fifth

213. *Collins*, 2015 WL 5254710, at *2.
214. *Id.*
215. Atl. Sounding Co. v. Townsend, 557 U.S. 404 (2009).
216. *Collins*, 2015 WL 5254710, at *2.
217. *Id.* at *4.
218. *Id.*
219. *Id.*
220. *See supra* Part I.C.2.c. for a discussion of *Baker*.
221. *Collins*, 2015 WL 5254710, at *4.
222. *Id.*
223. *Id.* (quoting Scarborough v. Clemco Indus., 391 F.3d 660, 668 (5th Cir. 2004), *cert. denied*, 544 U.S. 999 (2005)).
224. Guevara v. Mar. Overseas Corp., 59 F.3d 1496, 1513 (5th Cir. 1995), *abrogated by* Atl. Sounding Co. v. Townsend, 557 U.S. 404 (2009).
225. *Collins*, 2015 WL 5254710, at *4.

Circuit, Judge Fallon concluded that *Scarborough* "has been effectively overruled" by *Townsend*.[226] He determined that because *Townsend* abrogated *Guevara*, upon which the *Scarborough* holding was based, "*Scarborough* is inconsistent with current Supreme Court precedent."[227] Therefore, *Scarborough* did not bind the district court. Judge Fallon concluded that, based on *Townsend*, if the Jones Act does not apply, a seaman should recover punitive damages under general maritime law and be treated no differently than a non-seaman.[228] Because the plaintiff asserted a claim under general maritime law and not the Jones Act, she could pursue general maritime law punitive damages from the third-party non-employer tortfeasor.[229]

B. Hume v. Consolidated Grain & Barge, Inc.

Corey Hume and Clarence Robinson both worked as seamen aboard the M/V Bayou Special for the defendant, Consolidated Grain & Barge, Inc. ("CGB").[230] While at work, both plaintiffs suffered injuries and shortly thereafter instituted litigation against their employer, CGB, seeking damages for Jones Act negligence, unseaworthiness, and maintenance and cure.[231] They also brought suit against Quality Marine,[232] alleging negligence and unseaworthiness.[233] Additionally, they sought punitive damages from both defendants under general maritime law.[234]

To support its motion to dismiss the punitive damages claim,[235] Quality Marine relied on the United States Fifth Circuit precedent of

226. *Id.* at *5.
227. *Id.*
228. *Id.*
229. *Id.*
230. Hume v. Consol. Grain & Barge, Inc., No. 15-0935, 2016 WL 1089349, at *1 (E.D. La. Mar. 21, 2016).
231. Seamen's Complaint for Damages at 3–4, Hume v. Consol. Grain & Barge, Inc., No. 15-0935, 2016 WL 1089349 (E.D. La. Mar. 21, 2016).
232. *See Hume*, 2016 WL 1089349, at *1. Quality Marine owned the M/V Lewis, which pushed the M/V Bayou Special. *Id.*
233. *Id.*
234. Seamen's Complaint for Damages, *supra* note 231, at 5.
235. *Hume*, 2016 WL 1089349, at *1. The court dismissed the punitive damages claim against CGB and only needed to decide whether punitive damages could be recovered against the third party non-employer tortfeasor. *Id.*

McBride[236] and *Scarborough*.[237] In *McBride*, the Fifth Circuit cited *Miles*,[238] which limited a Jones Act seaman's recovery to pecuniary losses if liability arose from the Jones Act or unseaworthiness.[239] The Fifth Circuit concluded that because punitive damages are considered non-pecuniary[240] losses, the injured seaman in *McBride* could not recover punitive damages against his employer.[241]

Quality Marine also cited *Scarborough*,[242] an earlier decision in the Fifth Circuit.[243] *Scarborough* also relied on *Miles* to conclude that neither a seaman who has invoked the Jones Act nor his survivors may recover punitive damages from a non-employer third party.[244] To allow recovery of non-pecuniary damages would be inconsistent with the Jones Act in which Congress precluded the recovery of such damages in a Jones Act suit.[245]

The plaintiffs countered Quality Marine's cited caselaw by relying on *Collins v. A.B.C. Marine Towing, L.L.C.*[246] Judge Zainey agreed with Judge Fallon's decision in *Collins*.[247] Similar to *Collins*, the *Hume* plaintiffs' claim against a third-party non-employer, Quality Marine, did not implicate the Jones Act.[248]

Judge Zainey agreed that *Scarborough* has been "effectively overruled" by the Supreme Court's decision in *Townsend*.[249] As "the Jones

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236. McBride v. Estis Well Serv., L.L.C., 768 F.3d 382 (5th Cir. 2014) (en banc), *cert. denied*, 135 S. Ct. 2310 (2015).

237. Scarborough v. Clemco Indus., 391 F.3d 660 (5th Cir. 2004), *cert. denied*, 544 U.S. 999 (2005).

238. Miles v. Apex Marine Corp., 498 U.S. 19 (1990).

239. *Hume*, 2016 WL 1089349, at *2 (citing *McBride*, 768 F.3d at 384 (citing *Miles*, 498 U.S. 19)).

240. *See* David W. Robertson, *Punitive Damages in U.S. Maritime Law:* Miles, Baker, *and* Townsend, *supra* note 72, at 473–75 (proposing punitive damages are pecuniary losses and not non-pecuniary).

241. *McBride*, 768 F.3d at 391.

242. *Scarborough*, 391 F.3d at 668 (holding that neither a Jones Act seaman nor his survivors could recover non-pecuniary damages from third parties).

243. *Hume*, 2016 WL 1089349, at *1.

244. *Id.* at *2 (quoting *Scarborough*, 391 F.3d at 668). Quality Marine misstated the holding of *Scarborough*, which addressed non-pecuniary damages, not punitive damages. *Id.*; *see also Scarborough*, 391 F.3d at 668.

245. *Hume*, 2016 WL 1089349, at *2. *See Scarborough*, 391 F.3d 660.

246. Collins v. A.B.C. Marine Towing, L.L.C., No. 14-1900, 2015 WL 5254710, at *2 (E.D. La. Sept. 9, 2015).

247. *See supra* Part II.A.

248. *Hume*, 2016 WL 1089349, at *2.

249. *Id.* at *3 (citing *Collins*, 2015 WL 5254710).

Act has no bearing on Plaintiffs' claims against Quality Marine," the seamen could recover punitive damages under general maritime law against the non-employer tortfeasor.[250]

C. Howard v. Offshore Liftboats, L.L.C.

Contrary to Judge Fallon and Judge Zainey's reasoning, Judge Morgan took a different approach and denied the possibility of recovering punitive damages from a third party non-employer.[251] Raymond and Calvin Howard were injured during a personnel-basket transfer from the M/V Contender to the deck of the L/B Janie.[252] Offshore Liftboats, LLC ("OLB") employed both plaintiffs and owned the L/B Janie.[253] K & K Offshore, LLC ("KKO") owned and operated the M/V Contender.[254] The plaintiffs filed suit against OLB as their Jones Act employer, claiming negligence and seeking punitive damages as relief.[255] The two plaintiffs also sued KKO under general maritime law as a non-employer third party for negligence and unseaworthiness and sought to recover punitive damages.[256]

In its defense, KKO argued that *McBride*[257] controlled the case at hand. The plaintiffs cited *Collins* as support for the recoverability of punitive damages from the non-employer third party defendant.[258] Judge Morgan rejected the plaintiffs' argument and disagreed with Judge Fallon's reasoning in *Collins*.[259]

Judge Morgan noted that the *Townsend* decision specifically applied to the Jones Act plaintiff's maintenance and cure claim against the Jones Act employer.[260] The Supreme Court in *Townsend* carefully differentiated the historical maintenance and cure cause of action from a seaman's remedies for negligence and unseaworthiness.[261] Judge Morgan concluded that "although *Townsend* may give hope to seamen wishing to obtain

250. *Id*.
251. Howard v. Offshore Liftboats, L.L.C., No. 13-4811, 2015 WL 7428581, at *1 (E.D. La. Nov. 20, 2015).
252. *Id.*
253. *Id.*
254. *Id.*
255. *Id.*
256. *Id.*
257. *See supra* Part I.C.2.d.
258. *See supra* Part II.A.
259. *Howard*, 2015 WL 7428581, at *2.
260. *Id.*
261. *See id.*

punitive damages for unseaworthiness claims against their employers and non-employers, 'this [c]ourt cannot assume the Fifth Circuit has changed its position on personal injury claims falling outside the scope of *Townsend*.'"[262] Furthermore, Judge Morgan noted that *Scarborough* has never been overruled and thus remains binding on the Eastern District.[263] Accordingly, Judge Morgan granted the defendant's motion to dismiss the plaintiffs' claim for punitive damages.[264]

D. Wade v. Clemco Industries Corp.

Two years after the *Collins* decision, Judge Fallon changed course and denied awarding punitive damages against a third-party non-employer in *Wade v. Clemco Industries Corp*.[265] Garland R. Wade, the decedent, worked as a sandblaster and paint sprayer on vessels owned by Coating Specialists Inc. He also performed work in Louisiana and federal waters on permanent fixed platforms owned and/or operated by Chevron U.S.A. Inc. ("Chevron").[266] Plaintiff, Wade's widow, brought suit against Clemco Industries Corp. ("Clemco"), Mississippi Valley Silica Company ("MV"), Lamorak Insurance Co. ("Lamorak"), and Chevron, alleging that defective design, manufacture, and distribution of the materials used by the decedent in his work exposed him to silica and led to his cancer, which eventually caused his premature death.[267] Wade's widow also claimed failure to warn and failure to provide sufficient equipment and protective gear by Clemco, MV, and Chevron.[268] She requested more than $5 million in damages, including punitive damages for non-pecuniary losses.[269] Lamorak, MV, Clemco, and Chevron all filed motions for partial summary judgment to dismiss the plaintiff's claims for punitive damages.[270]

The defendants argued that, based on *Scarborough*, Wade's widow could not recover her non-pecuniary damages. Specifically, they argued that *Townsend* did not overrule *Scarborough* as to the availability of non-

262. *Id.* (quoting *In re* Oil Spill by the Oil Rig Deepwater Horizon in the Gulf of Mex., No. 2179, 2011 WL 4575696, at *11 (E.D. La. Sept. 30, 2011), *amended* (Oct. 4, 2011)).

263. *Id.*

264. *Id.* at *3.

265. Wade v. Clemco Indus. Corp., No. 16-502, 2017 WL 434425 (E.D. La. Feb. 1, 2017) (Fallon, J.).

266. *Id.* at *1.

267. *Id.*

268. *Id.*

269. *Id.*

270. *Id.* at *2.

pecuniary damages against a non-employer third party.[271] Instead, it simply allowed a seaman to recover punitive damages for the willful and arbitrary withholding of maintenance and cure payments.[272] Plaintiff countered that the Eastern District's decision in *Collins*, not *Scarborough*, applied to the case because "the Fifth Circuit's decision in *Scarborough* was based on *Guevara v. Maritime Overseas Corp.*, which was abrogated by the Supreme Court's decision in *Townsend*."[273] Thus, because *Scarborough* was no longer good law, a plaintiff who brings a claim that does not implicate the Jones Act should be treated no differently than any non-seaman.[274]

Evaluating the parties' arguments, Judge Fallon explained that "[t]his court is faced with the purely legal question of whether a seaman can recover non-pecuniary damages against a non-employer third-party tortfeasor under general maritime law."[275] Judge Fallon then noted initially that the availability of punitive damages under common law and general maritime law predates the Constitution.[276] In spite of this long history, however, the Supreme Court held in *Miles* that a seaman could not recover non-pecuniary damages from his or her Jones Act employer under either a negligence or unseaworthiness claim.[277] The *Miles* Court explained, "it would be inconsistent with this Court's place in the constitutional scheme to sanction more expansive remedies for the judicially created unseaworthiness cause of action, in which liability is without fault, than Congress has allowed in cases of death resulting from negligence."[278] Judge Fallon noted that since the *Miles* decision, trial and appellate courts nearly eliminated non-pecuniary damages in maritime personal injury law and wrongful death cases—until *Townsend*.[279]

In *Townsend*, the Supreme Court disturbed the trend of disallowing non-pecuniary damages by "explaining that its holding in *Miles* did not abolish all punitive damages under maritime law, as many courts seemed to be interpreting the decision."[280] Moreover, Judge Fallon noted that the *Townsend* Court "reiterated that '[b]ecause punitive damages have long

271. *Id.*
272. *Id.*
273. *Id.* at *3.
274. *Id.*
275. *Id.* at *4.
276. *Id.* (citing Atl. Sounding Co. v. Townsend, 557 U.S. 404, 409–11 (2009)).
277. *Id.* (citing Miles v. Apex Marine Corp., 498 U.S. 19, 20 (1990)).
278. *Id.* (quoting *Miles*, 498 U.S. at 20).
279. *See, e.g.*, Michel v. Total Transp., Inc., 957 F.2d 186, 191 (5th Cir. 1992); Murray v. Anthony J. Bertucci Const. Co., 958 F.2d 127, 131 (5th Cir. 1992).
280. *Wade*, 2017 WL 434425, at *4 (citing *Townsend*, 557 U.S. at 420).

been an accepted remedy under general maritime law, and because nothing in the Jones Act altered this understanding, such damages for the willful and wanton disregard of the maintenance and cure obligations should remain available.'"[281] The *Townsend* Court explained that lower courts read *Miles* far too broadly.[282] Furthermore, Judge Fallon explained that after *Townsend*, it became uncertain whether *Townsend* limited the recovery of punitive damages under general maritime law to only maintenance and cure claims or if plaintiffs could recover for other non-maintenance and cure claims.[283]

Judge Fallon, however, then cited to *McBride v. Estis Well Service, L.L.C.*, an *en banc* Fifth Circuit decision that held that neither a seaman nor his survivor could recover punitive damages for personal injury or wrongful death claims based on either the Jones Act or general maritime law.[284] *McBride* also confirmed that the reasoning of *Miles* "remain[ed] sound" for seaman personal injury and wrongful death claims.[285] The Fifth Circuit reasoned, similar to *Miles*, that it could not allow for more expansive damages for an action based on unseaworthiness than Congress allowed under the Jones Act.[286] Stated a different way, the *Townsend* holding would be limited to maintenance and cure claims.

Judge Fallon then turned to his earlier decision in *Collins*. In *Collins*, Judge Fallon noted that neither *Miles* nor the *en banc McBride* decisions addressed an action by a seaman against a non-employer third-party tortfeasor.[287] Judge Fallon changed positions from *Collins*, however, explaining that because the plaintiff elected to bring her claim under general maritime law, she is bound by any limitations that exist under general maritime law.[288] Citing to *McBride*, Judge Fallon further explained, "[i]t has become clear since the *en banc* opinion in *McBride* that in wrongful death cases brought under general maritime law, a survivor's recovery from

281. *Id.* (quoting *Townsend*, 557 U.S. at 419–20).

282. *Id.*

283. *Compare* Snyder v. L&M Botruc Rental, Inc., 924 F. Supp. 2d 728, 737 (E.D. La. 2013) (dismissing claims for punitive damages under general maritime law), *with* Callahan v. Gulf Logistics, L.L.C., No. 06-0561, 2013 WL 5236888, at *3 (W.D. La. Sept. 16, 2013) (holding that claimant could pursue punitive damages under general maritime law).

284. McBride v. Estis Well Serv., L.L.C., 768 F.3d 382, 385 (5th Cir. 2014), *cert. denied*, 135 S. Ct. 2310 (2015).

285. *Wade*, 2017 WL 434425, at *4 (quoting *McBride*, 768 F.3d at 385).

286. *McBride*, 768 F.3d at 388–89.

287. Collins v. A.B.C. Marine Towing, L.L.C., No. 14-1900, 2015 WL 5254710 (E.D. La. Sept. 9, 2015).

288. *Wade*, 2017 WL 434425, at *5.

employers and non-employers is limited to pecuniary losses."[289] Moreover, Judge Fallon bolstered this assertion by arguing that *Scarborough* supported this position and "[w]hile the *Scarborough* decision at one time seemed to be undermined by *Townsend*, it has been given clarity and vitality by the *en banc* decision in *McBride*."[290] According to Judge Fallon, based on *Scarborough* and *McBride*, "the Fifth Circuit has now made it clear that under both the Jones Act and general maritime law, a seaman's damages against both employers and non-employers are limited to pecuniary losses."[291] Hence, Judge Fallon granted the defendants' motions for partial summary judgment and dismissed the plaintiff's claims for punitive damages.[292]

A plaintiff filing in the Eastern District of Louisiana faces uncertainty depending on which judge presides. These conflicting decisions and others[293] have brought the issue of liability of third-party tortfeasors to the forefront of maritime law and signal the need to settle the murky waters of punitive damages. Although Judge Zainey may stand alone in his finding, the Fifth Circuit may soon join him by applying the principles set forth in *Townsend*.[294]

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289. *Id.* (citing *McBride*, 768 F.3d at 391).

290. *Id.*

291. *Id.*

292. *Id.*

293. Rockett v. Belle Chasse Marine Transp., L.L.C., No. 17-229, 2017 WL 2226319 (E.D. La. May 22, 2017) (Lemmon, J.) (holding that because the Fifth Circuit has not overruled *Scarborough*, neither a seaman nor a seaman's survivors could recover punitive damages from a non-employer third party for negligence or unseaworthiness under general maritime law); Rinehardt v. Nat'l Oilwell Varco L.P., No. 15-6266, 2017 WL 1407699 (E.D. La. Apr. 20, 2017) (Fallon, J.) (granting the defendant's motion for partial summary judgment to dismiss the plaintiff's claims for punitive damages against a third-party non-employer).

294. *See infra* Part III; *see also* Schutt v. All. Marine Servs. L.P., No. 16-15733, 2017 WL 2313199 (E.D. La. May 26, 2017) (Lemelle, J.), *appeal docketed* (considering only the purely legal question of whether a Jones Act seaman may recover punitive damages from a third party non-employer). This case was consolidated with Rockett v. Belle Chasse Marine Trans., L.L.C., No. 17-30470 (E.D. La. June 7, 2017). Both cases were later dismissed, *Schutt* on Jan. 5, 2018 and *Rockett* on Mar. 7, 2018. *See* Schutt v. All. Marine Servs., L.P., 2:16-cv-15733 (E.D. La. Jan 5, 2018); Rocket v. Belle Chasse Marine Trans., L.L.C., 2:17-CV-229 (5th Cir. Mar. 7, 2018).

III. THE CHANGING TIDES OF PUNITIVE DAMAGES UNDER GENERAL MARITIME LAW

Since *Townsend*, the Supreme Court has not addressed punitive damages in maritime law involving a Jones Act seaman. *Townsend*'s holding, however, suggests a change or clarification in the tides of seaman recovery. No longer should a seaman be denied the same right granted to a non-seaman against a non-employer third-party maritime tortfeasor simply because of his employment connection to a vessel.

A. Punitive Damages Are Available Under General Maritime Law

The Supreme Court has acknowledged and affirmed that general maritime law recognizes punitive damages as a remedy when not precluded by an applicable federal statute. In both *Townsend* and *Baker*,[295] the Supreme Court awarded punitive damages in claims predicated on general maritime law liability. Although the Court did not decide whether a Jones Act seaman can recover general maritime law punitive damages from a third-party non-employer, this claim does not implicate the Jones Act. With no preclusive federal statute, seamen should be given the full array of remedies.

B. Punitive Damages Should Be Available to a Jones Act Seamen for a Third Party's Misconduct

Seamen should be able to recover punitive damages under general maritime law against a third-party non-employer for three reasons. First, the Jones Act expanded the remedies available to seamen: Congress did not intend to limit any existing available remedies.[296] Second, a seaman's claim against a third party does not pertain to a Jones Act negligence claim against an employer. Moreover, allowing such damages adheres to the analytical framework of *Townsend*.[297] Third, the Supreme Court has slowly eroded the *Miles* uniformity principle and its preemptive effect.

1. The Jones Act Expanded the Remedies Available to Seamen

Congress did not intend to limit a seaman's remedies with the passage of the Jones Act. By its very text, the Jones Act gives a seaman the ability to "elect" to bring a claim against the employer, "thereby completing the

295. *See supra* Part I.C.2.c.–d.
296. *See supra* Part I.C.2.c.–d.
297. *See supra* Part I.C.2.d.

trilogy of heightened legal protections (unavailable to other maritime workers) that seamen receive because of their exposure to the 'perils of the sea.'"[298] Furthermore, the Jones Act "was remedial, for the benefit[s] and protection of seamen who are peculiarly the wards of admiralty. Its purpose was to enlarge that protection, not to narrow it."[299] The Act simply created a statutory cause of action for negligence against the seaman's employer but did not disturb any preexisting available general maritime law remedies.[300] Therefore, nothing in the Jones Act precludes the award of punitive damages against a non-employer third party not even contemplated in the statute. Throughout the history of maritime law, courts emphasize the need to protect seamen as the wards of admiralty.[301] Reading an invisible limitation into the Jones Act of these wards' right to recover general maritime law remedies against non-employer tortfeasors would undermine the core principle of maritime law to protect its wards.

Returning to the opening hypothetical, Gilligan should be able to recover the same damages as the passengers aboard the M.V. Minnow. Facing the same dangers as the passengers entitles him to the same protections afforded to the non-seafarers. Moreover, arguably in the maritime products liability context, a seaman should be given the ability to recover punitive damages from a maritime manufacturer presumably endangering countless other seamen. The Jones Act should not shield the maritime manufacturer's liability from damages caused by its willful and wanton misconduct. By enacting the Jones Act, Congress intended to expand the protections available to seamen;[302] to interpret it as limiting those protections would thwart Congress's intentions.

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298. Chandris, Inc. v. Latsis, 515 U.S. 347, 354 (1995) (citing G. GILMORE & C. BLACK, LAW OF ADMIRALTY § 6-21, pp. 328–29 (2d ed. 1975)).

299. The Arizona v. Anelich, 298 U.S. 110, 123 (1936). *See* Atl. Sounding Co. v. Townsend, 557 U.S. 404, 417 (2009).

300. *See Townsend*, 557 U.S. at 417.

301. *See* Ramsay v. Allegre, 25 U.S. 611, 620 (1827) (Johnson, J., concurring) (referring for the first time to seamen as the "wards of . . . Admiralty"). Many later cases followed this terminology. *See* Robertson v. Baldwin, 165 U.S. 275, 286 (1897); Wilder v. Inter-Island Steam Nav. Co., 211 U.S. 239, 247 (1908); Warner v. Goltra, 293 U.S. 155, 162 (1934) ("In respect of dealings of that order, the maritime law by inveterate tradition has made the ordinary seaman a member of a favored class. He is a 'ward of the admiralty,' often ignorant and helpless, and so in need of protection against himself as well as others.").

302. *Townsend*, 557 U.S. at 415–16.

2. Unrelated Claims and Parties: Distinguishing Miles *and Effectively Overruling* Scarborough

Using the analytical framework of *Townsend*, a claim against a third-party non-employer does not directly invoke the Jones Act.[303] Moreover, a claim against a third-party non-employer predated the federal statute, and the Jones Act did not displace any preexisting remedies.

In *Townsend*, the Court noted that a seaman's claim for maintenance and cure dates back to almost the 13th century, and the Jones Act in no way undermines the seaman's claim.[304] Similar to a claim for maintenance and cure, a seaman's right to sue a third party for a maritime tort exists as a separate and independent claim from a Jones Act negligence cause of action.[305] Congress has never addressed the liability of a third-party tortfeasor; therefore, a claim by a seaman against a third-party non-employer does not "sail in [the] occupied waters" of Congressional preemption.[306]

Similar to maintenance and cure, general maritime law recognized the tort of negligence for nearly two centuries. As early as 1859, the Supreme Court articulated, "[n]or is the definition of the term '*torts*' . . . confined to wrongs or injuries committed by direct force. It also includes wrongs suffered in consequence of the negligence or malfeasance of others, where the remedy at common law is by an action on the case."[307] A seaman long ago acquired the right to sue in maritime tort for damages.[308] As stated in *The Osceola*, the only limitation imposed by general maritime law on a seaman was the inability to sue the members of the crew or the master of the vessel for their negligence.[309] The Jones Act removed this jurisprudential

303. *See supra* Part I.C.2.d.

304. *Townsend*, 557 U.S. at 417–18.

305. Bridges v. Penrod Drilling Co., 740 F.2d 361, 364 (5th Cir. 1984).

306. Miles v. Apex Marine Corp., 498 U.S. 19, 36 (1990).

307. Phila., Wilmington & Balt. R.R. Co. v. Phila. & Havre de Grace Steam Towboat Co., 64 U.S. 209, 215–16 (1859).

308. *See, e.g.*, Pettingill v. Dinsmore, 19 F. Cas. 392 (D. Me. 1843) (allowing a seaman to recover damages for an assault and battery on the high seas); Allen v. Hallet, 1 F. Cas. 472 (S.D.N.Y. 1849) (awarding damages to a seaman for improper imprisonment during the course of the ship's voyage); Sheridan v. Furbur, 21 F. Cas. 1266, 1268 (S.D.N.Y. 1834) ("In the numerous cases brought into this court [by seamen] on claims for wages and for damages for personal torts . . . ."); Leathers v. Blessing, 105 U.S. 626, 630 (1881) ("Nor is the term 'tort,' when used in reference to admiralty jurisdiction, confined to wrong or injuries committed by direct force, but it includes wrongs suffered in consequence of the negligence of malfeasance of others, where the remedy at common-law is by an action on the case.").

309. The Osceola, 180 U.S. 158, 175 (1903).

bar but in no way affected remedies available under general maritime law against non-employers. The Act "did not eliminate pre-existing remedies available to seamen for the separate common-law cause of action based on a seaman's right [to sue in maritime tort]."[310]

Although the Supreme Court in *Miles* limited recovery against the employer in an unseaworthiness action arising under general maritime law because of its relationship to the Jones Act, the reasoning of *Miles* does not extend to a claim by a seaman against a third-party non-employer.[311] Claims by seamen against third-party tortfeasors are completely separate and apart from their remedy under the Jones Act. A claim for unseaworthiness could be brought against a vessel owner who also happens to be the Jones Act employer.[312] A claim against a true third-party non-employer, however, does not involve or relate to the Jones Act employer.

Unlike the no-fault claim for unseaworthiness in *Miles* and a negligence claim under the Jones Act, a claim for punitive damages against a third-party tortfeasor requires a much higher showing of misconduct[313]—typically willful, wanton, and reckless indifference for the safety of others.[314] The cause of action against the third-party non-employer could arise from different tortious acts with completely different levels of culpability. Gilligan's Jones Act employer could be found negligent simply for failing to check the hydraulic fluid in the steering system whereas the manufacturer recklessly allowed its product to be used with no warning to its consumers.

Therefore, it would be consistent with general maritime law to impose a more "expansive remed[y]"[315] in which the claim requires a significantly higher showing of fault than Congress dictated against a separately culpable third party. A claim for punitive damages against a third party that does not implicate the Jones Act or even arise from the same misconduct should not be precluded simply because of its distant relation to the Jones Act. Moreover, the Jones Act "evinces no general hostility to recovery under maritime law."[316] The law should not protect the more culpable third party under the guise of "uniformity" in seaman recovery.

In its pursuit of this uniformity, the Fifth Circuit in *Scarborough* incorrectly limited the recovery of a Jones Act seaman in a claim that has

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310. Atl. Sounding Co. v. Townsend, 557 U.S. 404, 415–16 (2009).

311. *See Miles*, 498 U.S. 19.

312. *See* David W. Robertson, *Punitive Damages in U.S. Maritime Law:* Miles, Baker, *and* Townsend, *supra* note 72, at 464 (referring to unseaworthiness and Jones Act negligence as being "Siamese twins" because of their close connection).

313. *See id.* at 472.

314. Exxon Shipping Co. v. Baker, 554 U.S. 471, 493 (2008).

315. *See Miles*, 498 U.S. at 32.

316. *Id.* at 29.

no bearing on the Jones Act.[317] Moreover, since *Scarborough* was decided, the Supreme Court in *Townsend* specifically rejected the reasoning of *Guevara*, upon which *Scarborough* relied, and has undermined the *Miles* uniformity principle that *Guevara*'s reasoning unnecessarily expanded.[318] The Jones Act simply created a statutory claim for negligence against the Jones Act employer, but it did not destroy "pre-existing remedies available to seaman for the *separate* common-law cause of action based on a seaman's absolute right to maintenance and cure."[319]

Although the identity of the Jones Act employer sometimes seems unclear due to the business entity's structure,[320] this uncertainty should not defeat an award of punitive damages against a third-party non-employer. Maritime law adopts the Highlander principle,[321] according to which "[the Supreme Court has] no doubt that under the Jones Act only one person, firm, or corporation can be sued as employer."[322] If a seaman works for a subsidiary or shell entity of the Jones Act employer, then that cause of action presents a different issue. If the third-party non-employer can be classified as a completely independent entity to the Jones Act employer, such punitive damages should be available against this separate, yet culpable, entity. This distinction necessarily requires a factual determination of the true identity of the Jones Act employer.

3. The Court Has Slowly Eroded the Miles *Uniformity Principle's Effect*

Turning to the *Miles* uniformity principle, as Judge Fallon pointed out in *Collins*, "it should make no difference whether the Plaintiff was a seaman, a longshoreman or a passenger."[323] Because no applicable congressional statute exists regarding the liability of a third party or non-employer, there

317. Collins v. A.B.C. Marine Towing, L.L.C., No. 14-1900, 2015 WL 5254710 (E.D. La. Sept. 9, 2015).

318. *See supra* Part II.B.2.

319. Atl. Sounding Co. v. Townsend, 557 U.S. 404, 415–16 (2009) (emphasis added).

320. *See* Crown Cent. Petroleum Corp. v. Cosmopolitan Shipping Co., 602 F.2d 474, 476 (2d Cir. 1979) (discussing the common practice in the shipping industry of corporations owned by the same persons and run by the same officers).

321. HIGHLANDER (Canon Films 1986). The Highlander principle derives from the iconic tag line of this movie, "There can be only one." *Id.*

322. Cosmopolitan Shipping Co. v. McAllister, 337 U.S. 783, 791 (1949). *See* Johnson v. GlobalSantaFe Offshore Serv., Inc., 799 F.3d 317, 325 (5th. Cir. 2015).

323. Collins v. A.B.C. Marine Towing, L.L.C., No. 14-1900, 2015 WL 5254710, at *4 (E.D. La. Sept. 9, 2015).

is no need to treat an employer under the Jones Act and a non-employer in a uniform fashion. Similar to Gilligan's situation, all plaintiffs in that cause of action should receive the same recovery from the manufacturer predicated on the same tort principles of general maritime law.

Moreover, the Court has eroded what *Miles* referred to as the uniformity principle. The Court first eroded this principle in *Exxon v. Baker*, in which the Supreme Court quoted *United States v. Texas*, stating, "to abrogate a common-law principle, the statute must 'speak *directly*' to the question addressed by the common law."[324] The Jones Act neither speaks "directly" about non-employers nor "directly" about barring punitive damages. Second, in *Townsend*, the Court declared that the quest for uniformity in maritime law does not require limiting damages to the "lowest common denominator" set by Congress for other separate causes of action.[325] Limiting a seaman's recovery in a separate cause of action against a third-party tortfeasor would unnecessarily bring his recovery to the lowest common denominator.

Furthermore, in *Yamaha Motor Corp. U.S.A. v. Calhoun*, the Court noted that Congress may have prescribed a comprehensive tort recovery regime with some claims, but as to others, Congress has not prescribed remedies.[326] Therefore, although DOHSA prescribed the remedies available for a wrongful death on the high seas, no congressional statute preempted or determined the recovery of damages in a state wrongful death action that did not occur on the high seas.[327] With the absence of Congressional mandate, the *Yamaha* Court could determine such recovery. Congress has not created a comprehensive statutory scheme regarding the liability of third-party non-employers or the categories of recoverable damages in cases arising under general maritime law. With this congressional silence, these areas of maritime law have not been preempted, and therefore, a seaman should be able to recover punitive damages from a third-party non-employer.

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324. United States v. Texas, 507 U.S. 529, 534 (1993) (citing Mobil Oil Corp. v. Higginbotham, 436 U.S. 618, 625 (1978) (emphasis added)).

325. Atl. Sounding Co. v. Townsend, 557 U.S. 404, 424 (2009); *see also* The Explorer, 20 F. 135, 138 (C.C.E.D. La. 1884) ("Even in cases of marine torts . . . courts of admiralty are in the habit of giving or withholding damages upon enlarged principles of justice and equity, and have not circumscribed themselves within the positive boundaries of mere municipal law.").

326. Yamaha Motor Corp., U.S.A. v. Calhoun, 516 U.S. 199, 215 (1996) (holding that damage limitations prescribed by DOHSA did not apply to a death occurring within the territorial waters of the state, and, therefore, state damage remedies would apply).

327. *Id.*

CONCLUSION

No one can avoid the inevitable changing tides of maritime legal concepts. Current Supreme Court precedent permits a Jones Act seaman to recover punitive damages for an employer's willful, wanton, and arbitrary withholding of general maritime law maintenance and cure benefits.[328] Although the Jones Act may preclude the recovery of punitive damages against the Jones Act employer for negligence and wrongful death, this congressional statute places no limitation on the damages recoverable in an ancient general maritime law tort cause of action against non-employer third-party tortfeasors. The third party should not be shielded from punitive damages under general maritime law simply because Congress may have protected the Jones Act employer from those types of damages.

The Fifth Circuit sitting *en banc* should address the issue of third-party liability for general maritime law punitive damages and overrule or clarify *Scarborough*.[329] A seaman should be able to recover general maritime law punitive damages for the tortious activity of a third-party non-employer. No statutory maritime law precludes the recovery of such damages for this wholly distinct and historically available cause of action. To disallow the recovery of punitive damages to a seaman would constitute a grave injustice and limit the protections of those who face the perils of the sea. The wards of admiralty should be given the same protection as a non-seafarer, and Gilligan should recover the same damages as his fellow castaways.

Sara B. Kuebel[*]

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328. *Townsend*, 557 U.S. at 424.

329. Scarborough v. Clemco Indus., 391 F.3d 660, 667 (5th Cir. 2004), *cert. denied*, 544 U.S. 999 (2005).

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